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The Images of the ‘Consumer’ in EU Competition Law

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I. INTRODUCTION

This chapter surveys the images of the consumer drawn within the sphere of EU competition law and seeks to provide an underlying explanation for the variety of images drawn. It also elucidates the rationale for the different meanings ascribed to the terms ‘consumer’ and ‘consumer welfare’ in the competition law context as compared to that adopted in the consumer law context.

The competition provisions in the TFEU make several express references to ‘consumers’¹ without defining the term.² Further, a number of allusions to the consumer can be found in the jurisprudence, secondary legislation and, most specifically, the Commission’s guidance documents. These sources (legislation, case law, decisional practice and Commission Guidelines) suggest, at first sight, that, as is the case in other areas of EU law, the image of the consumer painted by the law is not a uniform or monochrome one, but a colourful one, evoking a landscape of diversity. Indeed, these sources variously refer to, or distinguish between, for example: ‘consumers’ and ‘individual consumers’,³ ‘direct and indirect users of the products’,⁴

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¹ There are three specific references to the consumer in the Treaty on the Functioning of the EU (‘TFEU’) competition law provisions: see Art 101(3), Art 102(b) and, in the context of the state aid provisions, Art 107(2)(a) which lists ‘aid having a social character, granted to individual consumers’ as one of the forms of aid automatically compatible with EU Law.

² Apart from the reference to ‘individual’ consumers in Art 107(2)(a) TFEU (as distinguished from the reference to consumers in a generic sense in Arts 101 and 102), the Treaty does not offer a definition of consumer for the purposes of EU Competition Law. This is not uncommon in EU law. Many key concepts in the Treaty, eg the notions of ‘worker’ in Art 45 TFEU, and ‘undertaking’ in the context of the competition provisions themselves are not defined. In many cases, the case law has filled these gaps. See for instance, for the definition of *worker*, Case 53/81 *DM Levin v Staatssecretaris van Justitie* [1982] ECR 1035, para 17 and *undertaking*, Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, para 21 where the Court held that an undertaking constitutes ‘every entity engaged in economic activities, regardless of the legal status of the entity and the way in which it is financed’. In other cases, the task of giving meaning to undefined concepts has been performed by secondary legislation. For example, consumer protection directives have often defined the consumer as a ‘natural person who is acting for purposes which are outside his trade, business, craft or profession’ (see Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, [2011] OJ L 304/64, Art 2(1)). A common thread that has emerged from this exercise, however, has been that the meaning attributed to these concepts, whilst obviously inspired in the national legal systems, has a distinct and characteristic EU identity. This has not really happened in reference to the concept of consumer in EU competition law.

³ See the references to the wording of Art 107(2) (a) TFEU and that of Arts 101 and 102 TFEU (n 2).

⁴ See the Commission Guidelines on the application of Art 81(3) [now Art 101(3) TFEU] of the Treaty (the ‘Art 101(3) Guidelines’) [2004] OJ C 101/97, para 84.

‘professional end users and final consumers’,⁵ ‘intermediate and ultimate consumers’,⁶ ‘customers and consumers’,⁷ ‘competitors, consumers’ and ‘final consumers’⁸ and ‘individual undertakings and consumers’.⁹

This chapter considers this diversity of images and argues that although some loose and inconsistent language is sometimes deployed, when the apparently differing approaches are set within the broader context in which they are used, and against the overarching goals of EU Competition law, it can be seen that the interpretations adopted in each scenario are not in fact inconsistent with one another. Rather, the question of how the consumer is characterised and defined in the competition law sphere is dependent upon the context and the part of the competition law process in which it is used. In particular, the meaning of the term ‘consumer’ adopted fluctuates depending upon whether it is used in the context of: (i) describing the objectives of the competition laws and the consumers that those competition law rules are designed to protect; (ii) identifying persons during the process of determining whether the competition law rules have been infringed and, consequently, their objectives thwarted: for example, when deploying analytical tools or identifying whether particular persons, or groups of persons, have been harmed or benefited by the conduct at issue; or (iii) referring to some of the actors who participate in the enforcement of the substantive competition provisions.

Before focussing on the specific references to consumers that have been adopted in the legislation and jurisprudence, this chapter begins in section II by contextualising the discussion and setting out vital background to it. This section locates the relevance and central importance of the ‘consumer’ to the competition law enterprise generally, explaining why competition law rules were incorporated within the EU legal order and outlining their objectives. It notes that, although the objectives of the rules have not been made explicit, and have evolved, the emerging view is that their primary goal is, or should be, to prohibit the conduct of undertakings—entities engaged in economic activity¹⁰—which distorts competition in a way which harms the welfare of consumers and economic efficiency. Section II then goes on to consider what implications the debate over objectives has for competition law and how it influences the meaning attributed to the term ‘consumer’ within it. In particular, it considers whether a sole consumer welfare objective is pursued in EU law and, if so, what precisely *consumer welfare* means and *which* consumers’ welfare the rules seek to protect.

Section III scrutinises how the interpretation of the competition law rules impacts on the question of how, and to what extent, the interests of the identified consumers are protected in the application of Articles 101 and 102 TFEU and, at the same time, the vision of the consumer drawn, and the role that they play, in this process.¹¹ It observes that even if a consumer welfare objective is agreed, putting

⁵ See the Commission Guidelines on Vertical Restraints [2010] OJ C 130/1, para 56.

⁶ See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the ‘EUMR’) [2004] OJ L 24/1, Art 2(1)(b).

⁷ Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, paras 38–39.

⁸ Case C–501/06P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I–9291.

⁹ Case C–52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I–527, para 22. See also discussion of marginal and average consumers, see section III.B.i in this chapter.

¹⁰ See (n 2) for the definition of undertaking in EU competition law.

¹¹ Given the breadth and scope of the Treaty competition rules, this chapter will focus principally on the role of the consumer in the application of Arts 101 and 102 TFEU which, together with the EUMR

‘consumers’ at the core of the competition endeavour, there is considerable disagreement amongst commentators, policy- and law-makers as to how that ambition can be achieved in practice. It will be seen that, in the EU, the Commission or other claimants do not generally have to prove directly that the scrutinised conduct harms the welfare of consumers. Rather, EU law ordinarily tests indirectly for infringements through the application of presumptions and/or indirect assessments of the ability of the undertakings at issue to exercise market power. Consequently a recurrent theme which arises is the tension that exists between pursuing a consumer welfare objective and actually putting in place workable tests which can accurately determine harm or benefit to consumer interests. Because workability may entail a certain crudeness in the tests adopted, an important issue is frequently whether the tests utilised achieve the consumer welfare objective articulated by the Commission or whether, in particular, the rules might at times be either over-inclusive—so sometimes condemning legitimate business practices (creating a risk of false positives or ‘Type 1’ errors), and so potentially chilling pro-competitive conduct which benefits consumers, or under-inclusive—allowing anti-competitive practices which harm consumers to escape antitrust prohibitions (creating a risk of false negatives or ‘Type 2’ errors).¹² Furthermore, a second crucial issue that impacts on the application of EU competition law is whether, and if so when, other objectives, in particular the internal market objective, can ever trump and therefore override a consumer welfare objective where the goals clash,

Section IV briefly examines the rise of a stronger and more empowered consumer in the context of the public and private enforcement of the EU competition rules, and touches upon the relationship between regulation, consumer and competition law. Section V summarises the findings of this chapter and suggests a taxonomy of the images of the consumer in EU Competition law, arguing that this variety of images is apparent rather than real and effectively dependent upon the context in which the term ‘consumer’ is used. It also concludes that the fluidity of some of the key concepts that Competition law employs and the boundaries within which this discipline operates frequently means that an uncertain correlation exists between the motivation guiding the application of the rules and the promotion of the interests of final consumers.

II. THE OBJECTIVES OF EU COMPETITION LAW

A. Why Competition Law? The American Experience

More than 125 jurisdictions around the world now have in place systems of competition law (or antitrust law as they are known in the US).¹³ Broadly, such systems are designed to protect the process of competition in which active consumers buy products from suppliers competing vigorously to offer products (and services)

(n 6), constitute the core competition pillars that apply directly to the conduct of undertakings, see (nn 26- 27) and accompanying text.

¹² See section III.B in this chapter.

¹³ In contrast, ‘[u]ntil the mid-20th century less than 10 competition regimes existed worldwide’, United Nations Conference on Trade and Development, ‘Benchmarking Competition Systems: A Global Survey of Major Institutional Characteristics’ <<http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Benchmarking-Competition.aspx>> accessed 2 February 2015.

which represent the best value for money (in terms of price, quality and choice),¹⁴ and to deal with market imperfections arising, in a free market economy. The question that naturally follows, however, is: why precisely do states wish to protect competition and whose interests do they protect in so doing? The starting point is that without competition law rules, firms may be free to act to distort the process of competition by, for example, colluding or merging with their competitors. Further, firms which win the competitive battle or ‘natural’ monopolies may be free to act without any competitive restraint being exercised over their behaviour. Many competition law systems now pursue, or purport to pursue, a purely *economic* goal, seeking to prohibit such distortions which preclude the competition process in the free market from delivering products and/or services which offer consumers the best value for money and efficiencies, allocative, productive and/or dynamic. The reality is, however, that most systems have more complex origins, which may suggest a desire to protect a multiplicity of persons and to achieve a multiplicity of objectives, beyond a purely economic one, which do not all necessarily pull in the same direction.

In the US, for example, although it seems clear that the competition laws were initially adopted to meet the public’s desire ‘to do something’ about the trusts which were eliminating competition and competitors and gaining control over a swathe of core industries (hence they are known in the US as ‘*antitrust*’ law), the exact objective(s) underpinning that desire has been fiercely debated.¹⁵ Indeed, it has been observed that

the debates and events surrounding the passage of the Sherman Act contain something for everyone. To generations of observers, the Sherman Act’s legislative record has supplied a wishing well into which one can peer to glimpse evidence that supports preferred policies.¹⁶

Scholars have therefore supported competing views as to the legislative intention behind the Sherman Act, arguing that it was introduced to achieve a diverse range of goals, including ‘non-economic’ ones. These included, for example:¹⁷ to preserve

¹⁴ Value for money reflects the fact that consumers’ choices between products reflect not only price but also quality, service, functionality, and whether they offer consumers something new and exciting, see A Fletcher, ‘Privatisation, Economic Regulation and Competition in the Utilities: Have we got the balance right?’ Beesley Lecture Series, <<http://competitionpolicy.ac.uk/documents/107435/107584/Amelia+Fletcher+-+Beesley+Lecture+14+Nov+2013.pdf/0dd47fdb-f3b2-41e9-9a24-19b46ef271d4>> accessed 2 February 2015.

¹⁵ The debates and congressional reports stretch to eleven ‘fat’ volumes, H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Cambridge, Harvard University Press, 2005) 39.

¹⁶ E Gellhorn, WE Kovacic and S Calkins, *Antitrust Law and Economics in a Nutshell*, 5th edn (Eagan, Thomson West, 2004) 23. See also, *Northern Pacific Railway v United States* 356 US 1, 4 (1958).

¹⁷ See, eg RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York, The Free Press, 1993) 51; EM Fox and LA Sullivan, ‘Antitrust-Retrospective and Perspective: Where Are We Coming From? Where Are We Going?’ (1987) 62 *New York University Law Review* 93; R Pitofsky, ‘The Political Content of Antitrust’ (1979) 127 *University of Pennsylvania Law Review* 1051; RH Lande, ‘Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged’ (1982) 34 *Hastings Law Journal* 65; H Hovenkamp, ‘Distributive Justice and the Antitrust Laws’ (1982) 51 *George Washington Law Review* 1; L Schwartz, ‘“Justice” and other Non-Economic Goals of Antitrust’ (1979) 127 *University of Pennsylvania Law Review* 1076; Hovenkamp, *The Antitrust Enterprise* (n 15) 40–41; E Fox, ‘The Modernization of Antitrust: A new Equilibrium’ (1981)

opportunities for firms and individuals to enter a market and compete on the merits and on reasonable open terms (indeed, it was opportunity for small business that had forged the American character); to achieve fairness between big and small businesses and farmers; to prevent unfair wealth transfers from consumers to producers; to block private accumulations of political power and to protect democratic government;¹⁸ to promote consumer welfare; and/or to achieve a combination of these goals.

Although many of these broader objectives undoubtedly influenced the development of US antitrust law, Bork, a leading representative of the Chicago School of Economics, complained that the law cannot achieve such a broad '*pot pourri*' of goals (in particular, protecting smaller competitors may harm competition and consumers), and drew attention to the difficulties that would arise were the different goals to contradict one another and if non-economic goals were to sacrifice the benefits resulting from efficient markets.¹⁹ Bork went on to set out his view that the antitrust laws should pursue only one goal and that goal should be the maximisation of consumer welfare and economic efficiency.²⁰

Since then, it has become accepted by the US courts that the antitrust laws do aim to prevent conduct which will reduce competition in such a way that consumer welfare will be harmed; in particular, the Sherman Act is designed as a 'consumer welfare prescription'.²¹ Furthermore, and despite initial opposition, there is now widespread agreement between the different schools of thought (Chicago, Harvard and post-Chicago)²² that the antitrust system is

technocratic in the sense that antitrust be defined narrowly to examine only those issues that are purely without antitrust's ability to be measured and understood using industrial organization as the basis for economic analysis. This technocratic approach moves non-competition economic considerations to areas such as sector regulation, the legislative process, or executive fiat. Such areas are better equipped than antitrust to deal with political trade-offs between law and policy.²³

666 *Cornell Law Review* 1140; G Stigler, 'The Origin of the Sherman Act' (1985) 14 *Journal of Legal Studies* 1.

¹⁸ The American notion of equality ('all men are created equal', Thomas Jefferson, Declaration of Independence 1776) led to a mistrust of power concentrated in the hands of a few, whether private or governmental. The Jeffersonian ideal was diffused power in the hands of citizen farmers and small businessmen, see LA Sullivan and WS Grimes, *The Law of Antitrust: An Integrated Handbook* (MN, West Publishing Group, 2006) 5.

¹⁹ Bork, *The Antitrust Paradox* (n 17) 50 'Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law? ... Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules'.

²⁰ Bork, *The Antitrust Paradox* (n 17) 51. He sets out two related propositions. '(1) The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore (2) "Competition," for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.'

²¹ *Reiter v Sonotone Corp* 442 US 330, 343 (1979). See also *NCAA v Board of Regents of University of Oklahoma* 468 US 85, 107–08 (1984).

²² Hovenkamp, *The Antitrust Enterprise* (n 15) 31–32.

²³ R Blair and D Sokol, 'Welfare Standards in US and EU Antitrust Enforcement' (2013) 81 *Fordham Law Review* 2497, 2505.

This acceptance still leaves considerable scope, however, for diverging views as to exactly *what* ‘consumer welfare’ means, and *how* that objective can be achieved.²⁴

B. EU Competition Law: The Treaty Context, Early Enforcement and the Emerging Consumer Welfare Objective

Competition policy is one of the foundational areas of competence of the EU institutions. Indeed, the original version of the EEC Treaty provided that its activities should include ‘a system ensuring that competition in the [internal market] is not distorted’. It thus embedded the principle of ‘undistorted competition’ into the fundamental provisions of the Treaty as a mechanism for reinforcing, complementing and implementing other Treaty provisions and tasks, in particular, the functioning of the internal market.²⁵ The Treaty also incorporated a set of competition provisions which are now found in Articles 101–109 TFEU and secondary legislation. The two key TFEU competition provisions applicable to undertakings,²⁶ and the focus of this chapter, are Articles 101 and 102, which target, respectively, collusive and unilateral anti-competitive behaviour.²⁷ Article 101(1) prohibits agreements and concerted practices between two or more undertakings which have as their object or effect the restriction of competition and which do not meet the legal exception criteria set out in Article 101(3) (broadly where the restrictions are indispensable to produce sufficient countervailing benefits, a fair share of which are passed on to consumers)²⁸ whilst Article 102 prohibits abuse of a dominant position.²⁹ These rules are now supplemented by the EU Merger Regulation (‘EUMR’), currently Regulation 139/2004,³⁰ which prohibits mergers (or ‘concentrations’) between undertakings which would significantly impede effective competition in the EU.

Although the TFEU sets out specific prohibitions of anti-competitive practices, it neither provides an explanation of what their goals are nor defines the core concepts set out within them, such as what constitutes a ‘restriction’ of competition, an ‘abuse’ or a ‘dominant position’.³¹ It has therefore been for the EU Courts to put flesh on these provisions and to elucidate their meaning. Those courts

²⁴ Hovenkamp, *The Antitrust Enterprise* (n 15) 31 and see section II.C of this chapter.

²⁵ See now Art 3(1)(b) TFEU, which confers exclusive competence to the EU in ‘the establishment of the competition rules necessary for the functioning of the internal market’.

²⁶ For the definition of undertaking in EU competition law see (n 2).

²⁷ The TFEU also contains provisions which prevent states from distorting the competitive process. Art 106 TFEU sets out rules to prevent Member States maintaining in force measures contrary to the competition and other Treaty rules and deals with the application of the competition rules (and other rules of the Treaties) to public undertakings and those granted special or exclusive rights by Member States. It contains a limited exemption (Art 106(2)) from the Treaty rules for such undertakings which has been construed narrowly. Art 37 TFEU also requires Member States which have state monopolies of a commercial character to eliminate discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed. Arts 107–109 TFEU contain the rules that apply to the provision of state aid in the EU.

²⁸ See further section III.B.iv of this chapter. Restrictive provisions in an agreement infringing Art 101 TFEU are void, see Art 101(2) TFEU.

²⁹ In both cases, a breach of these provisions will only take place if the agreement or practice has an effect, either actual or potential, on intra Union trade.

³⁰ See now EUMR (n 6).

³¹ See Arts 101 and 102 TFEU and discussion about the open-ended nature of many provisions in the TFEU in (n 2).

have made it clear that Articles 101 and 102 both have the same goal(s),³² but have shied away from setting out a plain statement of their objectives. The process of teasing out their aims has therefore been largely an inductive and evolving one which has been surrounded by intense controversy. Some general observations can, however, be made.

First, as a result of the inextricable link between the internal market project and the competition law system set out in the EU Treaties, the Court of Justice and the General Court have interpreted the competition rules so as to prohibit conduct which ‘might tend to restore the national divisions in trade between Member States’³³ and so frustrate the most fundamental objectives of the EU, the creation of an internal market.³⁴ It is clear, therefore, that the EU competition law rules have been used as an instrument of market integration, meaning that tensions between the single market objective and a purely competition objective can arise.³⁵ Significantly, and for the purposes of this chapter, it will be seen that the policy of upholding the single market objective has been argued to have had a negative impact on consumer interests in some cases.

Second, it is arguable that the EU’s commitment to ‘undistorted competition’ enshrines multi-faceted goals³⁶ which permit non-competition, or public policy, factors to play an influential role in the development of EU competition law or aspects of it.³⁷ For example, it seems clear that early application of the competition rules was influenced, in particular, by Ordoliberal³⁸ ideas and the desire to protect the competitive process as a mechanism for promoting rivalry, the protection of ‘individual economic freedom of action as a value in itself’, ‘consumer choice’ and for restraining abuse of market dominance. Some such views may have encouraged interpretation and application of the competition laws in such a way as to protect competitors themselves, rather than the competitive process (and consumers), to favour small- or medium-sized enterprises, to keep markets open, to protect the process of rivalry between firms and to achieve fairness between firms operating on

³² Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215, paras 24–25.

³³ Joined Cases 56 and 58/64 *Établissements Consten and Grundig-Verkaufs v Commission* [1966] ECR 299, 340.

³⁴ For some more recent examples, see Joined Cases C–403 and 429/08 *Football Association Premier League Ltd v QC Leisure* [2011] ECR I–9083, para 139 (Art 101); Cases C–468 *Sot Léllos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proïonton* [2008] ECR I–7139, paras 65–66 (Art 102).

³⁵ See eg section III.B.ii of this chapter.

³⁶ D Geradin, A Layne-Farrar and N Petit, *EU Competition Law and Economics* (Oxford, Oxford University Press, 2012), 1.70.

³⁷ Indeed, Art 120 TFEU specifically states that ‘the Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an *efficient allocation of resources*’ but no specific reference is made to an efficient allocation of resources in the EU competition rules.

³⁸ See, eg P Lowe, ‘Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?’ (13th International Competition and 14th European Competition Day, Munich, 27 March 2007) <http://ec.europa.eu/competition/speeches/index_2007.html> accessed 2 February 2015; W Möschel, ‘The Proper Scope of Government Viewed from an Ordoliberal Perspective: the example of competition policy’ (2001) 157 *Journal of Institutional and Theoretical Economics* 4; D Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, Clarendon Press, 1998) 331–33 and P. Behrens, ‘The Ordoliberal Concept of an “Abuse” of a Dominant Position and its Impact on Article 102 TEFU’ in P. Nihoul and I. Takahashi, *Abuse Regulation in Competition Law*, Proceedings of the 10th ASCOLA 2015.

the market. Although many do not agree that Ordoliberalism should be an objective pursued today, some references to it may still be gleaned from the Court's case law.³⁹

Further, certain public policy goals, such as environmental protection, administration of justice and public health, appear to have influenced competition law analysis, especially the application of Article 101.⁴⁰ Therefore, even though Articles 101 and 102 do not themselves specifically refer to such public policy goals,⁴¹ the EU Commission and the EU Courts have sometimes taken account of these factors, particularly given the context of the rules within the TFEU and the importance that those courts have placed upon teleological and contextual readings of the EU Treaties.⁴² Indeed, a complex and controversial issue, which is more alive than ever after the entry into force of the Lisbon Treaty, is whether EU competition law can be legitimately isolated from other EU policies. For example, Article 7 TFEU sets out the principle of consistency between all EU policies and activities and Articles 11 and 12 TFEU provide, respectively, for the integration of environmental and consumer protection requirements in the implementation of other EU policies, which naturally include competition policy.

Third, the emerging view of the European Commission (the 'Commission'), which has sought to modernise its application and interpretation of the competition law rules since the end of the 1990s, and to distance itself from the previous approach based on broader 'public policy' objectives, is that the appropriate goal for Articles 101 and 102, and the EUMR, is 'to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.⁴³ The Commission takes the view that pursuit of this goal, which is supported by many commentators, will ensure the efficient functioning of markets to the benefit of consumers and the global competitiveness of EU businesses. Indeed, former Competition Commissioner Joaquín Almunia stressed that consumer welfare is not just a catchy phrase; rather it 'is the cornerstone, the guiding principle of EU competition policy'.⁴⁴

³⁹ See eg, Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, judgment of 28 Feb 2013, paras 92–93 and see also nn (61–62) of this chapter and accompanying text.

⁴⁰ See C Townley, *Article 81 EC and Public Policy* (Oxford, Hart Publishing, 2009) ch 2. For example, in Case C-309/99 *JCJ Wouters, JW Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, intervener: *Raad van de Balies van de Europese Gemeenschap* [2002] ECR I-1577, para 97, the Court found that rules adopted in the Netherlands which prohibited members of the Bar practising in full partnership with accountants did not have as their object or effect the restriction of competition. Although the arrangements restricted services that could be offered and reduced scope for efficiencies, the Court concluded that it was not unreasonable for the Bar Council to take the view that these restraints were necessary for the proper practice of the legal profession.

⁴¹ In fact the Art 101(3) Guidelines (n 4) only refer to economic efficiencies to the exclusion of non-economic considerations. See further R Whish and D Bailey, *Competition Law*, 7th edn (Oxford, Oxford University Press, 2012) 160.

⁴² Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991, para 45; *JCJ Wouters* (n 40) para 97 ff; and Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209, para 102.

⁴³ Art 101(3) Guidelines (n 4) para 13.

⁴⁴ J Almunia, 'Competition – What's in it for Consumers?' <http://europa.eu/rapid/press-release_SPEECH-11-803_en.htm?locale=en> accessed 2 February 2015.

C. Consumer Welfare as an Objective of EU Competition Law: Which Consumers' Welfare Does Competition Law Protect?

The discussion above indicates that it is crucial both to the rationality of any competition law system, and to the question of whose interests it protects, that its goals are well-defined. Further, although it is clear that the overall purpose of EU competition law is to ensure a system of undistorted competition within the internal market that can contribute to the achievement of the aims and wellbeing of the European Union, the crucial issue of what specific objectives it pursues in order to achieve this overarching goal has not been clarified. Nonetheless, the Commission has, in the course of its process of modernisation, sought to rectify the uncertainty by reiterating its belief that competition rules should be designed to promote consumer welfare and efficiency.

One essential problem with the 'consumer welfare' concept articulated, and which is now championed as the goal of a number of competition law systems around the world, is that it is often used, especially by competition agencies, without clear explanation of what exactly is meant by it and exactly which consumers' welfare it protects. Indeed, when Bork adopted the term it was only rarely used and had no standard meaning in economics.⁴⁵ The phrase has thus been described by some as a 'shibboleth'⁴⁶ or as 'the most abused term'⁴⁷ in modern antitrust analysis.

In the competition law context, the term consumer welfare is ordinarily used as a synonym for one of two things. When Bork used this phrase in his seminal book,⁴⁸ he appears to have meant what is now referred to as 'total' or 'social welfare': that is, the objective of maximising efficiency for society as a whole (the sum of producer surplus and consumer surplus— that is total surplus) whoever benefits from those efficiency gains (whether producers or consumers).⁴⁹ On this approach, the total welfare of consumers as a class and the 'wealth of the nation' *overall* is used to assess changes in welfare—consequently, everyone in society (whether producers, distributors, retailers or final consumers) is characterised as a 'consumer' and competition law is not concerned with how that wealth is distributed amongst sellers and buyers and the members of society. Rather, so long as winners gain more than losers lose, total welfare is maximised and the conduct should be permitted.⁵⁰

⁴⁵ G Werden, 'Antitrust's Rule of Reason: Only Competition Matters', 7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227097> accessed 2 February 2015.

⁴⁶ G Werden, 'Essays on Consumer Welfare and Competition Policy', 5 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352032> 2 February 2015.

⁴⁷ JF Brodley, 'The Economic Goals of Antitrust Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 *New York University Law Review* 1020, 1032.

⁴⁸ Bork, *The Antitrust Paradox* (n 17) 90–91.

⁴⁹ *Social (total) welfare* is thus the sum of producer surplus (the profits a producer makes by selling goods over the cost of production) and consumer surplus (the difference between what consumers would be prepared to pay for goods and what they do pay). The objection to monopoly, or the exercise of market power, is that it does not just transfer some consumer surplus to producers but that some surplus (the deadweight) is totally lost to the market, Bork, *The Antitrust Paradox* (n 17) 90 ('Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation'). But see, eg Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust' (n 17) esp 88–89.

⁵⁰ This is known as a 'Kaldor-Hicks' improvement, see eg RJ Van den Bergh and PD Camesaca, *European Competition Law and Economics: A Comparative Perspective*, 2nd edn (London, Sweet & Maxwell, 2006) 29–30.

Another view, however, which now appears to have become the standard,⁵¹ is that the objective of the competition law rules should be the maximisation of efficiency but *only* if consumers receive a fair share of the total wealth—so the goal is to maximise *consumer* surplus,⁵² and consequently it is this narrower aim which should be identified with consumer welfare. Under this elucidation, consumers are equated with ‘buyers’ on the market.

In most cases pursuit of either a total or (narrower) consumer welfare objective will achieve the same outcome. In exceptional circumstances, however, pursuit of the consumer welfare objective could result in the prohibition of conduct which results in an increase in efficiency overall, but which creates a transfer of consumer surplus to producers;⁵³ this concept thus favours buyers over sellers.⁵⁴ It is therefore crucial to know which of the outlined approaches the law favours and, consequently, which consumers’ interests it protects: whether it is those of *all* of society, some groups within it (all those on the buyer side) and/or some groups more than others (final consumers more than intermediate buyers).⁵⁵

The Commission has not explicitly stated which standard it prefers. Nonetheless, it does appear to have rejected the broader social welfare standard expounded by Bork and to support the narrower consumer welfare standard. In press releases, speeches, policy documents and reports, it continually stresses that it acts for the benefit of European *consumers* and to prevent practices which will result in ‘consumer detriment’, resulting from higher prices, reduced output or choice or lower quality of goods or services, or diminished innovation. It thus seeks to maintain an

⁵¹ Werden, ‘Essays on Consumer Welfare’ (n 46) 11.

⁵² For the view that the concept of ‘consumer sovereignty’ or ‘consumer choice’ ‘the possibility and the right, for customers, to choose freely the products/services best corresponding to their needs, and the economic partners they want to deal with’, plays an important role in EU competition law, see, eg P Nihoul, ‘Freedom of Choice: The Emergence of a Powerful Concept in European Competition Law’ (2012) 3 *Concurrences* 55. See also RH Lande, ‘Consumer Choice as the Ultimate Goal of Antitrust’ (2001) 62 *University of Pittsburgh Law Review* 503 (but contrast eg D Wright and DH Ginsburg ‘The Goals of Antitrust: Welfare Trumps Choice’ (2013) 81 *Fordham Law Review* 2405).

⁵³ eg OE Williamson, ‘Economies as an Antitrust Defense: The Welfare Tradeoffs’ (1968) 58 *American Economic Review* 18 (Williamson’s efficiency trade-off model demonstrates that even a merger which will result in price rises above previous levels may increase total welfare if the cost savings to which it gives rise are greater than the loss suffered by consumers as a result of the reduction in output (the merger produces a net efficiency gain even though it permits the firm to raise its price above its marginal cost)) and JB Kirkwood and RH Lande, ‘The Fundamental Goals of Antitrust: Protecting Consumers, Not Increasing Efficiency’ 84 *Notre Dame Law Review* 191, 224–31.

⁵⁴ This approach privileges the buyer (the consumer) above the seller (the producer), assuming the welfare of one is inherently more precious than that of the other and leads therefore to a form of discrimination between the two. A question which consequently is interesting is whether Arts 101 or Art 102 should be concerned not only with the exercise of market power on the sellers’ side but also the exercise of market power on the buyers’ side (monopsony power). Monopsonists, like monopolists, have power over price as they have the power to reduce the price paid for an input upstream (which also reduces the quantity of input supplied and utilised and, indeed, Art 101 has been applied to buyer cartels and Art 102 specifically prohibits both unfair selling and unfair *buying* prices). Although such conduct inhibits the maximisation of the wealth of society as a whole, it is the input producers upstream that are harmed and the view could be taken that if the competition laws are designed to protect consumers on the buyer side of the market, such conduct should not be condemned unless those holding monopsony power also have market power in the output market, see eg T Rosch, ‘Monopsony and the Meaning of Consumer Welfare: A Closer Look at Weyerhaeuser’ [2007] *Columbia Business Law Review* 353, but contrast G Werden, ‘Monopsony and the Sherman Act: Consumer Welfare in a New Light’ (2007) <<http://ssrn.com/abstract=975992>> accessed 2 February 2015.

⁵⁵ Werden, ‘Essays on Consumer Welfare’ (n 46) 5–6.

undistorted system of competition which will, in turn, deliver consumer benefit. Although the adoption of this narrower standard is not uncontroversial, it does gain some support from the TFEU itself.⁵⁶ For example, Article 101(3), which provides the legal exception to Article 101(1) for restrictive agreements that produce countervailing benefits, demands that a ‘fair share’ of such identified benefits or efficiencies must be passed on to consumers (see further section III.B.iv below). Further, Article 102 specifically states that an abuse of a dominant position may consist of (a) imposing ‘unfair’ selling prices or unfair trading conditions,⁵⁷ (b) ‘limiting production, markets or technical development’ to the prejudice of consumers or (c) engaging in discriminatory behaviour (‘applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’) (see further section III.B.v below). Similarly, Article 2(1)(b) of the EUMR states that there is need to take account of the ‘interests of intermediate and ultimate consumers’ when assessing the compatibility of a proposed concentration with EU law. In addition, pursuit of a consumer welfare objective—focussing more closely on allocative rather than productive efficiency—may be justifiable on the grounds that it is easier to apply than a social welfare objective and that it is a more palatable objective as it evokes ‘ideas of fairness, redistribution, and protection of the many and vulnerable, making this rhetoric attractive to politicians, policy-makers, and competition officials.’⁵⁸

An important issue that presides over the consumer welfare debate in the EU, however, is that, despite support for a consumer welfare approach from the Commission and a number of commentators and practitioners, the case law of the Court does not unambiguously endorse it as the ultimate objective of EU Competition law. While, in 2006, two judgments of the General Court, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission* and *GlaxoSmithKline Services Unlimited v Commission* indicated support for such a goal,⁵⁹ subsequent judgments of the Court of Justice have placed greater emphasis on the need to protect not only the interests of consumers, but the interests of competitors and the structure of the market and competition as such.⁶⁰ In *TeliaSonera*,⁶¹ for example, the Court held that the function of the Treaty competition rules is precisely ‘to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.’

The Court therefore seems to attach significant importance to competition as a process that should in itself be protected. Although this could be taken to suggest support for broader goals and/or Ordoliberal ideas, it could also support the view that protecting that process, and precluding hindrances to it, benefits consumers—that is, that protecting the market structure from artificial distortions is the best mechanism for protecting the interests of the consumer in the medium to longer term. Further,

⁵⁶ See also Art 12 TFEU.

⁵⁷ So exploiting customers. However, it also refers to unfair purchase prices, see (n 54).

⁵⁸ R Nazzini, *The Foundations of European Union Competition Law, The Objectives and Principles of Article 102* (Oxford, Oxford University Press, 2011) 44–45.

⁵⁹ Cases T–213 and 214/01 *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission* [2006] ECR II–16011, para 115 and Case T–168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II–2969 para 118.

⁶⁰ *GlaxoSmithKline* (n 8), para 63.

⁶¹ *TeliaSonera* (n 9), para 22.

these statements clearly indicate that the Court considers that the welfare of consumers forms at least part of the EU competition law fabric, even if it is not its sole or core objective. Indeed, in *Post Danmark*,⁶² the Grand Chamber of the Court gave a judgment which, although containing no express statement about the objectives of the law, did focus heavily on the effects of the conduct on consumers, and in *Groupement des cartes bancaires v Commission*,⁶³ the Court placed emphasis on the poor allocation of resources to the detriment, in particular, of consumers that results from certain types of collusive behaviour between firms liable to infringe Article 101.

In sum, therefore, important observations, relevant to our examination of the roles of the consumer in EU competition law, are that whilst the Commission has, post-modernisation, enthusiastically adopted consumer welfare as the key objective of EU competition law in its Guidance documents, the Court has been more guarded in ranking it above other equally important objectives: in particular, the single market project and the promotion of competition itself. Further, if it is to be accepted that EU competition pursues, whether solely or primarily, a ‘consumer’ welfare objective in the narrow sense, a few important conclusions can be drawn about the meaning of ‘consumer’ and ‘consumer welfare’ in this competition law context and the way that competition law protects such consumers’ interests.

First, a statement that the competition law system pursues a ‘consumer welfare’ objective denotes that it pursues an economic objective. Although there is a debate in the EU as to whether non-economic or public policy factors can also be taken into account in a competition law assessment (and if so where and how), the consumer welfare objective itself does not seem to incorporate non-economic considerations as it does in the consumer protection realm.⁶⁴

Second, it follows from the structure of the Treaty, which contains a set of prohibitions on anti-competitive behaviour, that the principal focus of the rules is on *eliminating* conduct stemming from anti-competitive agreements, conduct or mergers of undertakings that is liable to harm consumer welfare rather than on actively promoting it through positive action. Consequently, there are some distortions of competition and market imperfections which operate to prevent the process of competition delivering value for money to consumers that competition law cannot reach. In such cases, consumer law and/or regulatory tools might be required, alternatively or additionally, to make markets work more efficiently for the benefit of consumers (see further III. C below).

Third, despite the populist rhetoric that might seem inherent in the slogan ‘consumer welfare’, such an objective is not designed solely to protect the interests of ‘final consumers’ (natural persons acting outside their ‘trade, business, craft or

⁶² Case C-209/10 *Post Danmark AS v Konkurrencerådet*, judgment of 27 March 2012.

⁶³ Case C-67/13P *Groupement des cartes bancaires (CB) v Commission*, judgment of 11 September 2014.

⁶⁴ In their seminal work, Averitt and Lande note that competition law seeks to address external market failures that reduce the choices available to consumers and is concerned with the proper functioning of the markets, whilst consumer protection law addresses internal market failures that prevent consumers from making rational choices and thus has the non-economic aim of protecting consumers against deception, asymmetries of information, etc. NW Averitt and RH Lande, ‘Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law’ (1996) 65 *Antitrust Law Journal* 713, 713–14. In their view, however, both areas of law complement each other and are bridged by the notion of consumer sovereignty, see also references cited at (n 52).

profession’)⁶⁵ or individual ‘consumers’ (persons who purchase goods or services for personal use).⁶⁶ Although, it will be seen that the EU Courts and Commission do sometimes use the term consumer in these narrower senses when making substantive competition law assessments (see further III below) and the Commission has a tendency to emphasise the benefits that the enforcement the competition law rules have for individual citizens, ‘consumers’ in this technical sense encompasses all those on the buyer side, whether they are indirect or direct users, small or large, natural or legal persons (indeed many will be businesses), intermediate buyers or final consumers. This broader definition of the consumer concept, although perhaps counterintuitive, is explicable on the basis of the rationale underlying the application of competition law.⁶⁷ The rules promote the process of competition for the benefit of all such consumers and do not perform the more protective function performed by consumer law, such as safeguarding the interests of those perceived to be the weaker or more vulnerable party in individual contractual transactions.⁶⁸ This broad construction of the term ‘consumer’ is crucial, as it provides the fulcrum on which secondary assessments and interpretations of the core concepts set out in the competition law rules are based. We return to this point in section III when we consider the role that the consumer plays in competition law assessments.

Fourth, because the consumer welfare objective seeks to protect the interests of the relevant ‘consumers’ overall, it is frequently necessary, in determining whether the rules have been infringed, to weigh the interests of some groups of consumers’ against those of others. Further, harm to current consumers may have to be weighed against the (more speculative) benefits to future consumers which may be achieved by the conduct in the longer-term (and vice versa). Indeed, an approach focussing only on immediate consumer interests might be at risk, in particular, of disregarding the impact of the conduct on competition, productivity and/or innovation and the interests of consumers in the long run (see further III below).⁶⁹ The term ‘consumer’ thus has a general rather than an individual character.

Fifth, the objective pursued may also have an impact upon how the rules are enforced: in particular, how a public enforcement agency determines in what way to devote its resources towards enforcement and whether private enforcement should be permitted and encouraged (see section IV). Finally, it is seen in the section below that

⁶⁵ See, eg the Consumer Rights Directive (n. 2), Art. 2(1) and the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29, Art 2(b).

⁶⁶ See the definition in the Oxford English Dictionary, where a consumer is defined as: ‘a person who purchases good or services for personal use’.

⁶⁷ See A MacCulloch, ‘The Consumer and Competition Law’ in G Howells, I Ramsay and T Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Cheltenham, Edward Elgar, 2011) 77, 79.

⁶⁸ *ibid*, but see the discussion of Ordoliberal ideas in references at (n 38) and accompanying text as well as section III.B.v of this chapter and eg a Report prepared by A Fletcher, A Karatzas and A Kreutzman-Gallasch for the Federation of Small Businesses, ‘Small Businesses as Consumers: Are They Sufficiently Well Protected?’ January 2014. Competition agencies might also decide to focus their resources on bringing proceedings in cases which involve harm to a particularly vulnerable group of consumers, see section IV of this chapter. For statements of the protective function of consumer law, see Joined Cases C–240/98 *Océano Grupo Editorial SA v Roció Murciano Quintero* [2000] ECR I–4941, para 25; Case C–168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I–10421, paras 25–26.

⁶⁹ See Art 101(3) Guidelines (n 4), para 87, and Case C–238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I–11125 para 70.

even if an overarching consumer welfare objective is agreed and pursued, this is not an easy objective to achieve.

III. ACHIEVING A CONSUMER WELFARE OBJECTIVE; CONSUMER WELFARE AS A ‘GUIDE’ IN THE APPLICATION OF THE LAW

A. Introduction: Market Power and Rules and Standards

In the previous section we introduced the idea that the image of the consumer used to define the *objectives* of EU competition law is a wide-ranging one. In this section, we examine more closely how EU Competition law seeks to achieve that objective and how the interests of different groups of consumers are taken into account in so doing. This enables us, simultaneously, to analyse other visions of the ‘consumer’ that emerge in the competition law context, in particular when identified as a tool in the process of making competition law *assessments*.

A particular problem in achieving a consumer welfare objective is that it is not ordinarily realistic or feasible to test directly in an individual case how the conduct at issue has, or will have, an impact upon consumer welfare, because efficiency is difficult to measure. Such an objective does not mean therefore that all conduct can, or should, be tested under competition law to see whether it harms or benefits consumer welfare.⁷⁰

Rather, because it is frequently too difficult to measure how conduct affects efficiencies directly, the overarching objective plays a role principally by guiding or shaping the interpretation of core concepts (such as a ‘restriction’ of competition or an ‘abuse’ of a dominant position) and the crafting of tests and/or presumptions to identify such conduct. These tests are guided by economics and, in particular, by an assessment of whether the conduct at issue is liable to interfere with the competitive process and/or to permit the relevant undertakings to exercise market power—‘the ability to maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time’⁷¹—and/or achieve offsetting efficiencies. Because they cannot always replicate economists’ (frequently conflicting) views,⁷² in many cases it is necessary, in considering how to construct legal rules or standards aimed at distinguishing anti-competitive from pro-competitive conduct (to separate the antitrust goats from the beneficial sheep),⁷³ for a trade-off to be made between the application of more complex standards or clearer bright-line rules. The former require detailed factual and economic analysis, which is more difficult and costly to apply both by undertakings and decision-takers, whilst the latter require less sophisticated analysis and less emphasis on expert economic evidence but which may, consequently, be less accurate in some cases. In making such trade-offs, it will be necessary to consider whether an approach which may

⁷⁰ But see, eg Werden, ‘Essays on Consumer Welfare’ (n 46) arguing that it can in the context of merger control consumer welfare can operate as the objective, guide and legal test.

⁷¹ Art 101(3) Guidelines (n 4) para 25.

⁷² See eg Justice Breyer’s dissenting judgment in *Leegin Creative Leather Products Inc v PSKS Inc, DBA Kay’s Klostet* 551 US 877 (2007).

⁷³ *ibid.*

sometimes condemn legitimate business practices and allow Type 1 errors is a lesser or greater evil than one which may sometimes allow Type 2 errors.⁷⁴

In the next sections we will consider the references to, and relevance of, the consumer and consumer interests in the framework of five key competition law assessments: (i) the assessment of market power and dominance; (ii) the determination of when presumptions of harm to consumer welfare should be employed in the application of Article 101; (iii) the determination of when presumptions of no harm to consumer welfare should be employed in the application of Article 101; (iv) the balancing of anti and pro-competitive effects in the context of Article 101; and (v) the determination of what constitutes an ‘abuse’ under Article 102.

B. Substantive Interpretation of the Law: Identifying Anticompetitive Conduct and the Role of the Consumer in Competition Law Assessments

(i) The consumer in the assessment of market power and dominance

A core concern of competition law is that there should be effective competition in markets and firms should not be able to engage in anticompetitive agreements, conduct or mergers which will permit them to exercise market power and deprive consumers of the benefits that that competition would otherwise bring, through low prices, choice, quality and/or innovation. Many competition law assessments thus commence with a consideration of the relevant undertaking’s (or undertakings’) market power.⁷⁵

Article 102, for example, targets only the behaviour of firms that possess a ‘dominant position’—a concept which the Court has equated with market rather than commercial power and the ability of the ‘dominant firm’ to maintain prices above competitive levels⁷⁶—and so might be in a position to exploit that market power and to engage in anticompetitive conduct which excludes competitors from the market. Dominance has been defined by the Court in *Hoffmann-La Roche* as a position of economic strength enjoyed by an undertaking ‘which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, *its customers and ultimately of the consumers*’.⁷⁷

In this case, it can be seen that the Court refers to ‘consumers’ more narrowly than in the way identified in the discussion of ‘consumer welfare’ above, seemingly equating the concept with final consumers and distinguishing them from competitors and other customers (or consumers) operating on the buyer side. Although this might at first appear to suggest a different vision of the term ‘consumer’, on closer scrutiny, it is seen that it is not in fact symptomatic of an inconsistent approach but is just a reflection of the different context in which the notion is used. Rather, the ostensibly different vision drawn emerges because the final consumer in this case is simply

⁷⁴ eg OECD, *Resale Price Maintenance* (2008) <<http://www.oecd.org/daf/competition/43835526.pdf>> accessed 2 February 2015.

⁷⁵ But see section III.B.ii of this chapter.

⁷⁶ Case T-321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II-2805, para 267 and Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v Commission* [2012] ECR I-000, judgment of 6 December 2012, para 177–81.

⁷⁷ *Hoffmann-La Roche* (n 7) paras 38–39, emphasis added.

identified as part of the process of ascertaining the features of a dominant firm which distinguishes it from a non-dominant one; in this case, the Court thus equates the ability of the dominant firm to act independently of buyers (direct customers or final consumers) and other suppliers (competitors) with its ability to exercise market power—to maintain higher prices whilst at the same time maintaining a much greater market share than those of its competitors.⁷⁸

The term consumer also appears, and plays an important role, when determining the relevant market in which the competition law assessment takes place; in this case the different categories of consumer again play a distinct role in the process of determining the relevant market, which is simply one step taken on the route to the final determination of whether an infringement of the competition law rules (which harms consumer welfare) has been committed. In competition law, the question of whether one or more firms has/have market power (or a dominant position) is generally determined not directly⁷⁹ but indirectly through use of proxies such as an analysis of market shares and other factors such as barriers to entry into the market. This requires the ‘relevant’ market on which the undertakings concerned operate to be identified (from both a product and geographic perspective) so that an assessment of the conditions of competition on that market can be made. Where this approach is taken, market definition sets out an important preliminary step which permits the identification of the boundaries of competition between firms, the competitive constraints that the relevant undertaking(s) face from actual competitors, potential new entrants and/or buyers and, consequently, an assessment of whether or not it has sufficient market power, for example, to be found dominant or to restrict competition on that market.⁸⁰

The Court has held that the relevant market consists of products (or services) which are interchangeable with each other but not (or only to a limited extent) interchangeable with those outside it. This interchangeability may be with other products or with the same products from elsewhere; it thus has both a product (the product market) and a geographical dimension (the geographic market). Although the Court has stressed the importance of using qualitative criteria such as characteristics, price and intended use⁸¹ for assessing functional interchangeability, the truth is that these criteria are not always very helpful in shedding light on the core issue that the process is seeking to answer;⁸² ie whether the undertaking or undertakings are operating on markets which may be monopolised. Competition agencies, including

⁷⁸ *AstraZeneca* (n 76).

⁷⁹ There is a growing view, however, that, especially in merger analysis, other tools (such as pricing pressure indices) can substitute for traditional analysis based on market definition, market shares and concentration measures, see eg L Kaplow, ‘Why (Ever) Define Markets?’ (2012) 57 *Antitrust Bulletin* (special issue); J Farrell and C Shapiro, ‘Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition’ (2010) 1 *BE Journal of Theoretical Economics* 1.

⁸⁰ Commission, Notice on the definition of the relevant market for the purposes of Community competition law (‘Notice on Market Definition’) [1997] OJ C372/5, para 10.

⁸¹ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207.

⁸² They will not shed light when trying to determine, for example, whether or not sparkling mineral water is in the same market as still mineral water, tap water, orange juice, or tonic water. All of these products have similar characteristics and uses. The Commission now recognises the limited usefulness of analysing the characteristics and intended use of a product when defining the market, except as a preliminary step when considering the possible substitutes for a product. See Notice on Market Definition (n 80), para 36.

the Commission, thus tend now to use less subjective and more scientific mechanisms for determining the relevant markets, in particular, by relying on the hypothetical monopolist, or Small but Significant Non-transitory Increase in Price ('SSNIP'), test to provide a conceptual framework for their identification. Essentially, the test starts by hypothesising a particular relevant market (for example, a market for bottled sparkling water in France) and then assuming a small (5–10%) rise in the price of that product. It is then asked whether this price increase would cause customers to purchase another product (for example, bottled still water), or to purchase bottled sparkling water from another area, to such an extent that the price rise is unprofitable.

If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable.⁸³

The SSNIP test thus requires an assessment of demand substitution (determination of the range of products viewed as substitutes by consumers (or customers) on the buyer side) and supply substitution (whether suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices) to determine whether the hypothetical price rise would be possible.

It is against this background that the use of the term 'consumer' in the Commission's Notice on the definition of the relevant market (the 'Market Definition' Notice)⁸⁴ and cases must be understood. The discussion above establishes that in identifying the market, too great an emphasis must not be placed on the subjective viewpoint of any one group, or groups, of consumers. For example, the Commission and Court were criticised in the classic case of *United Brands*⁸⁵ for identifying a relevant product market for 'bananas' partly on the basis that there was a distinct group of final consumers (the young, the elderly, the sick) who would not think that bananas could be substituted for other kinds of fruits.⁸⁶ The SSNIP test clarifies, however, that the important question in determining whether bananas can be identified as a relevant market which could be monopolised (ie whether it is an economically meaningful market) is not whether there are some consumers who will not switch to another product following a rise in its price or even whether a majority of consumers will not switch, but whether a *sufficient* number of consumers will switch to make the price rise unprofitable. If therefore it is impossible to discriminate against the 'infra-marginal' customers who cannot, or who will not, switch—in the bananas case, the young, old and sick—by charging them a higher price, then the behaviour of marginal customers (who are able to switch) must be taken into account as it is this (not the behaviour of groups of consumers or even the average consumer) which affects a supplier's pricing decisions and which is, consequently, crucial in the determination of the market.⁸⁷

⁸³ *ibid*, para 17.

⁸⁴ Notice on Market Definition (n 80).

⁸⁵ *United Brands Company* (n 81).

⁸⁶ *ibid*, paras 27–34.

⁸⁷ See Notice on Market Definition (n 80), para 43.

The Commission stresses the importance of the marginal consumer in its Market Definition Notice. For example, it states that the question to be answered in applying the SSNIP test is whether ‘the parties’ customers’ could switch to substitutes in such volume to make the price increase unprofitable (because of the resulting loss of sales). By way of practical example it states:

In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5% to 10% for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.⁸⁸

In the Market Definition Notice, the Commission seems to use the terms ‘customers’ and ‘consumers’ interchangeably to emphasise the importance of testing consumers’ preferences as a whole.⁸⁹

An important practical problem, however, arises in actually applying the SSNIP test. How are customers’ (or consumers’) reactions to the hypothetical price rise to be gauged? In the EU, the Commission is willing to use both empirical evidence (using preliminary information gathered from, in particular, the investigated firms, their main customers,⁹⁰ suppliers and competitors as well as other industry players) and quantitative tests⁹¹ devised by economists.⁹² Although such techniques are not panaceas, they can, when used correctly and rigorously, be helpful tools to use within the SSNIP framework. The past and future reactions of consumers (whether intermediate or final) may thus be important to the analysis where relevant evidence is available: for example, evidence of consumers’ past behaviour or ‘revealed preference’ (ie reaction to past changes in prices)⁹³ or evidence of how they might behave in the future when making estimations of cross-elasticity.⁹⁴

(ii) Presumptions of harm to consumer welfare: agreements which have as their object the restriction of competition

Defining relevant markets and then assessing whether the conduct at issue facilitates, or will facilitate, the strengthening or exercise of such market power involves

⁸⁸ *ibid*, paras 17–18.

⁸⁹ See also Nihoul, ‘Freedom of Choice’ (n 52).

⁹⁰ Consumer questionnaires may have to be treated with some caution, however, as it is recognised that asking hypothetical questions may lead to biased results and that interviewees may, in practice, behave differently from how they answer survey questions.

⁹¹ Notice on Market Definition (n 80), paras 36–43. See also, G Monti, *EC Competition Law* (Cambridge, Cambridge University Press, 2007) 135–38.

⁹² Including elasticity estimates, tests based on similarity of price movements over time (price correlation analysis), causality calculations, price convergence analysis, evidence of recent substitution in the past available as a result of actual events or shocks in the market (‘shock analysis’) or critical loss analysis, see eg Van den Bergh and Camesasca (n 50) 137.

⁹³ See Notice on Market Definition (n 80), paras 38–39.

⁹⁴ *ibid*.

complex and time-consuming analysis. Although such analysis is necessary in many cases (see sections (iv) and (v) below), most competition law systems take shortcuts and seek to sidestep a full analysis in cases where anti-competitive effects are very likely (or where they are very unlikely: see (iii) below). For example, competition law systems frequently apply presumptions of illegality to agreements which clearly distort the process of competition and which are always, or virtually always, likely to restrict competition. Clear rules against such obviously pernicious conduct are considered acceptable as they eradicate the need for a claimant to prove, at cost, its adverse consequences. In the EU, Article 101(1) allows for a (rebuttable) presumption of illegality to be applied,⁹⁵ as it prohibits both agreements which have as their object the restriction of competition and those which have such an effect. The Court has made it plain that the words ‘object or effect’ are alternative,⁹⁶ not cumulative, requirements: so if the object of the agreement is found to be ‘sufficiently deleterious’, it need not be established that it also has a restrictive effect. Complex market analysis and proof of actual or likely effects on competition and consumers are thus avoided⁹⁷ – a restriction of competition is assumed. Although an infringement of Article 101 can be avoided by the parties demonstrating that the agreement has off-setting benefits and meets the criteria for legal exception under Article 101(3), in practice discharging this burden is difficult. Indeed, the Commission’s view is that such agreements are presumed not to satisfy the conditions of Article 101(3) (so the conduct is generally prohibited by the competition law rules).⁹⁸

A crucially important question therefore is which agreements have as their object the restriction of competition and how is it determined which agreements fall within that object category? Clearly if an overarching consumer welfare objective is to be achieved, best practice suggests that the rule should be drawn on the basis of economic principles so that it yields minimal error costs (especially from over-inclusive presumptions of illegality which may lead to false positives: ie wrongly presuming that pro-competitive agreements infringe the competition law rules).⁹⁹

The EU courts have held that the objectives, context and content¹⁰⁰ of an agreement are critical to the determination of whether it is ‘by its very nature’ injurious to competition and restrictive of competition by object. Content, in particular, holds significant weight¹⁰¹ and jurisprudence establishes that specific agreements, including horizontal cartels¹⁰²—broadly, anti-competitive arrangements between competitors to fix prices, make rigged bids (collusive tenders), establish

⁹⁵ In the US, in contrast, a conclusive (irrebuttable) presumption of illegality is applied in per se cases.

⁹⁶ eg Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, para 123.

⁹⁷ Even in these cases, however, some assessment of the relevant market is required under EU law to demonstrate that the jurisdictional element of Art 101 TFEU is satisfied—that the agreement appreciably affects trade between Member States; see Case C-439/11 P *Ziegler SA v Commission*, judgment of 11 July 2014.

⁹⁸ Art 101(3) Guidelines (n 4), para 46.

⁹⁹ See *Groupement* (n 63), Opinion of AG Wahl.

¹⁰⁰ *GlaxoSmithKline* (n 8), para 58.

¹⁰¹ Although objectives and context may be relied upon both to expand or contract the category, see eg, A Jones and B Sufrin, *EU Competition Law*, 5th edn (Oxford, Oxford University Press 2014) ch 4.

¹⁰² Case T-374/94 *European Night Services Ltd (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission* [1998] ECR II-3141, para 136.

output restrictions or quotas, or share or divide markets¹⁰³—and certain vertical agreements (see further below) are likely to be found restrictive by object. In a recent decision, the Court has reiterated that the category of agreements restrictive of competition by object must be interpreted restrictively and applied to situations where an agreement inherently reveals a ‘sufficient degree of harm to competition’.¹⁰⁴

The assumption of a restriction of competition in relation to cartel activity is uncontroversial. Indeed, as there is growing international acceptance that such activity poses a serious threat to economies and consumers and constitutes ‘the supreme evil of antitrust’¹⁰⁵ and ‘the most egregious’¹⁰⁶ violation of competition law, many antitrust systems do treat such conduct as an ‘automatic’ violation of the rules.¹⁰⁷ Parties to cartels deliberately set out to interfere with free competition, to contradict the principles of the free market economy and to act instead to protect the prosperity of the participants as a whole. In addition, such agreements are costly to create and enforce,¹⁰⁸ they harm efficiency (they are estimated to cost society billions¹⁰⁹) and are ‘naked’—‘[t]hey seek to restrict competition without producing any objective countervailing benefits’.¹¹⁰ The direct interference with the free operation of competition justifies the presumption of illegality to all cartels, whatever the parties’ market shares, the level of the market at which the cartel operates, the product or service involved and whether or not it can be demonstrated that the cartel has in fact harmed consumer welfare or final consumers. Their likely impact upon welfare (total and consumer) thus operates as a guide for rules because most cartels will reduce ‘consumer welfare’ and will never increase it.¹¹¹ Indeed, in *Groupement des cartes bancaires*, the Court held that since horizontal price fixing by cartels

may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101(1)], to prove that they have actual effects on the market ... Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.¹¹²

¹⁰³ Commission, ‘Recommendation of the Council concerning Effective Action against Hard Core Cartels’ COM (98) 35 final.

¹⁰⁴ *Groupement* (n 63), para 53.

¹⁰⁵ *Verizon Communications v Law Offices of Curtis v Trinko* 540 US 398, 408 (2004). eg OECD, *Fighting Hard Core Cartels: Recent Progress and Challenges Ahead* (2003), and speech of M Monti, ‘Fighting Cartels Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?’ (3rd Nordic Competition Policy Conference, Stockholm, 11–12 September 2000).

¹⁰⁶ COM(98) 35.

¹⁰⁷ In the US, for example, cartel arrangements are, because of their pernicious effect on competition and lack of any redeeming virtue, considered to be illegal per se under s 1 of the Sherman Act of 1890, *Northern Pac R Co v United States* 356 US 1, 5 (1958).

¹⁰⁸ Van den Bergh and Camesasca (n 50), s 5.2.1.2.

¹⁰⁹ eg OECD, *Hard Core Cartels – Recent progress and Challenges Ahead* (2003)

¹¹⁰ Monti, ‘Fighting Cartels Why and How?’ (n 105).

¹¹¹ Because cartel agreements are generally ‘naked’, generating no countervailing benefits of efficiencies, the parties are most unlikely to establish that the criteria of Art 101(3) TFEU (for legal exception) are met.

¹¹² *Groupement* (n 63), para 51.

The extent to which the object category should be used in relation to agreements other than naked cartel activity is, however, controversial.¹¹³ In the EU it has also been held to encompass vertical agreements¹¹⁴ containing provisions fixing the minimum prices at which retailers can sell the contract products (resale price maintenance: ‘RPM’)¹¹⁵ and those conferring absolute territorial protection (‘ATP’) on a distributor or otherwise partitioning national markets.¹¹⁶ Vertical agreements are, however, not ordinarily concluded between competitors but between providers of complementary goods and services. Consequently, they are less ‘obviously’ anti-competitive than horizontal agreements and provide greater scope for efficiencies. Indeed, a manufacturer of a product will generally want to ensure that its product is distributed in the most efficient manner possible so that it competes more effectively with the products of its competitors. Vertical agreements may, therefore, be used to expand markets through solving free-rider or double marginalisation problems, to lower costs through efficiencies and/or to promote investment and innovation through solving a ‘hold up’ problem. The assumption that a vertical agreement, which has more ambiguous welfare effects, restricts competition arguably creates a greater risk that false positives will result and the consumer welfare will not be achieved because consumers may be deprived of the benefit of an efficiency-enhancing agreement.

This point is illustrated by the early case of *Consten and Grundig*.¹¹⁷ In this case the Commission had held that distribution arrangements, which resulted in Consten being granted the exclusive right to sell Grundig products in France (neither Grundig itself nor any other Grundig distributor was entitled to sell the products there) had as its object the restriction of competition. The parties disputed this assessment arguing that the agreement was pro-competitive; it had been essential to enable Grundig to penetrate the French market. Indeed, without the promise of ATP, Consten would not have agreed to take the risk of acting as distributor in France as other distributors (outside of France) would have been able to take a ‘free ride’ upon its promotional and investment efforts there. Although, therefore, the agreement resulted in the existence of only one distributor of Grundig products in France (there was a restriction on competition between distributors of Grundig products—a restriction of *intra-brand competition*), the agreement led to an increase in competition for consumer electronics products in France (ie there was an increase in *inter-brand competition*) and, consequently, had beneficial effects for consumers. The parties

¹¹³ One controversial issue is the question whether an agreement incorporating severe restraints, such as a horizontal price or output restraint, should be characterised as restrictive by object where the restraints are argued to be inherent in, or objectively necessary to, a *pro-competitive* venture, for example, where horizontal price restraints are not ‘naked’ but are designed, and necessary, to achieve some efficiency-enhancing or other legitimate objective, see eg Case C-382/12P *MasterCard Inc and Others v Commission*, judgment of 11 September 2014 and the Commission Staff Working Document, Guidance on restrictions of competition “by object” for the purposes of defining which agreements may benefit from the *De Minimis* Notice, COM (2014) 249 final 6.

¹¹⁴ See also eg Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 and Case C-32/11 *Allianz Hungária Biztosító Zrt v Gazdasági Versenyhivatal*, judgment of 14 March 2013.

¹¹⁵ eg Case 243/83 *SA Binon and Cie v SA Agence et messageries de la presse* [1985] ECR 2015, para 44.

¹¹⁶ *Consten & Grundig* (n 33). A dealer has ATP when it is shielded from all competition in the sale of the manufacturer’s products (from the manufacturer itself and from other distributors of that manufacturer’s products) in that territory.

¹¹⁷ *ibid.*

argued therefore that the Commission should have conducted a fuller market analysis to determine whether the agreement had as its effect the restriction of competition.¹¹⁸ The Court, however, upheld the Commission's Decision. The agreement giving Consten the exclusive right of sale of Grundig products in France had as its *object* the restriction of competition so an assessment of its *effect* was deemed unnecessary. It also upheld the Commission's view that the agreement did not meet the Article 101(3) criteria. The Court has reiterated this strict stance towards absolute territorial vertical restraints on several occasions.¹¹⁹

This line of cases is important. First, it illustrates how EU competition rules are, in the context of vertical territorial restraints, influenced by the internal market project;¹²⁰ concerns about the impact of an agreement on the integration of national markets may therefore outweigh efficiency arguments raised by the parties.

Second, it illustrates more broadly that the more extensive the category of agreements to which a virtually irrefutable presumption of illegality is applied, the greater the risk that some pro-competitive agreements will be condemned, and others deterred, with the effect that competition, and consumers, may be harmed. In the EU the question of whether it is rational or reasonable to assume vertical territorial, and price, restraints restrict competition and/or whether a change of approach is required, has provoked extensive debate.¹²¹ Arguably, the approach is not defensible given the potential for such agreements to increase inter-brand competition and consumer welfare.

The application of the EU rebuttable presumption of illegality to these cases is strongly supported by the Commission. The Commission and the Court consistently stress the importance of the competitive process at all levels of the market and have been concerned about arrangements which result in the elimination of rivalry and competition (or price competition) between distributors of a manufacturer's product. Further, the Commission has emphasised that the risk of Type 1 errors is minimised as it is always open to the parties to demonstrate that the agreement does in fact produce efficiencies which are passed on to consumers.

Third, and crucially for the purposes of our discussion, the assumption of a restriction of competition demonstrates that where an automatic presumption of harm to consumer welfare is applied, there is no need for any image of the consumer to be drawn, or considered, at the Article 101(1) stage of the assessment. The extent to which consumer interests have *really* been harmed by the anti-competitive behaviour

¹¹⁸ This view was supported by Roemer AG, who considered it to be wrong that Art 101(1) should be applied, on the basis of purely theoretical considerations, to a situation which might, upon closer inspection, reveal no appreciable adverse effects on competition. A restriction could not be established without looking at the market *in concreto* and without taking account of competition between similar products. In a case like this one, where the agreement had already been implemented, the Commission should have made a comparison between two market situations: that after making the agreement and that which would have arisen had there been no agreement. If Grundig would not have found an outlet for its products in the absence of supplying a sole concessionaire, the exclusive distribution agreement clearly promoted competition; it would have been necessary for Grundig to gain access to the new market.

¹¹⁹ See, for a more recent example, *GlaxoSmithKline* (n 8).

¹²⁰ See cases cited at (n 34) and accompanying text.

¹²¹ eg A Jones, 'Resale Price Maintenance: A Debate About Competition Policy in Europe?' [2009] *European Competition Journal* 425 and J Goyder, 'Is Nothing Sacred? Resale Price Maintenance and the EU Policy Review on Vertical Restraints' in Swedish Competition Authority (eds), *The Pros and Cons of Vertical Restraints* <<http://www.kkv.se/globalassets/english/research/report-the-pros-and-cons-of-vertical-restraints-18mb.pdf>> 167,173–74 (accessed 6 February 2015).

is not examined; it is taken for granted. These consumer interests are only considered at a later analytical stage, in particular if the parties attempt to establish that the Article 101(1) prohibition does not apply because the agreement produces offsetting efficiencies and delivers consumer benefits under Article 101(3) (see section (iv) below).

(iii) Presumptions of legality: safe harbours

At the other end of the spectrum, many competition law systems apply a presumption of legality to agreements between parties which are unlikely to have sufficient market power to be able to restrict competition.¹²² In the EU, an agreement is presumed to be legal either: (a) where any restriction of competition is liable to be insignificant, or *de minimis*,¹²³ because of the very weak position of the parties; or (b) because it falls within the scope of one of the EU block exemption regulations (which are directly applicable), so it is presumed to satisfy the conditions of Article 101(3).

Block exemptions have generally been crafted by the Commission,¹²⁴ following its experience of examining agreements individually, to grant an ‘exemption’ under Article 101(3) to categories of agreements which, in its experience, are unlikely to restrict competition and/or are likely to generate efficiencies—in particular, where the parties do not have significant market shares and where the agreements do not contain listed ‘hard core restraints’. The list of hard core restraints closely mirror the object restraints discussed in section (ii) above and reflects the Commission’s view that agreements containing such restraints are presumed to violate Article 101 and cannot benefit from a presumption of legality under a block exemption.

Some block exemption regulations pertain to specific sectors (for example, insurance).¹²⁵ Others apply more generally, for example, to vertical (Regulation

¹²² As Art 102 only applies to the unilateral conduct of undertakings which hold a dominant position (see section III.B.i of this paper), unilateral conduct (other than mergers) of firms which are not dominant do not fall within the scope of the competition law rules.

¹²³ In this respect, see Case 5/69 *Franz Völk v SPRL Ets J Vervaecke* [1969] ECR 295 and the Communication from the Commission – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (‘De Minimis Notice’) [2014] OJ C291/1.

¹²⁴ They are adopted generally by the Commission, acting in the exercise of delegated powers from the Council.

¹²⁵ Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector [2010] OJ L83/1.

330/2010),¹²⁶ horizontal cooperation (Regulations 1217/2010¹²⁷ and 1218/2010)¹²⁸ or technology transfer (Regulation 316/2014)¹²⁹ agreements.

In the context of block exemptions, therefore, no detailed scrutiny of an agreement that falls squarely within the scope of exemption is required as the Commission has made an *a priori* determination that even if such an agreement restricts competition, it will satisfy the four conditions of Article 101(3), and in particular that *consumers* will receive a ‘fair share’¹³⁰ of the benefits generated by the agreement (see further section (iv) below).¹³¹ In other words, the benefits that the agreement yields for consumers are taken for granted and presumed; the block exemptions operate as a safe harbour and their protection can only be withdrawn prospectively.¹³²

(iv) Anti-competitive effect in the application of Article 101(1) TFEU and the balancing of pro and anti-competitive effects in the application of Article 101(3) TFEU

Where the two extreme presumptions of legality or illegality do not apply under Article 101, a fuller competition law assessment will be required to determine whether (a) the agreement has as its effect the restriction of competition; and, if so, (b) whether it satisfies the conditions of Article 101(3).

Since in Article 101(1) ‘effect’ cases a restriction of competition is not assumed, the likely impact of the agreement on inter- (and/or intra-) brand competition must be determined. Indeed, ever since 1966, and its judgment in *Société Technique Minière v Maschinenbau Ulm GmbH*,¹³³ the Court has recognised that agreements which do not have as their object the restriction of competition, should be assessed in their market context and an economic approach adopted when determining their effect. This position has been reiterated on many occasions. The Commission thus states in its Article 101(3) Guidelines that, in general, to establish that the agreement has as its effect the restriction of competition, a claimant will have to establish that it affects ‘actual or potential competition to such an extent that on the

¹²⁶ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

¹²⁷ Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] OJ L335/36.

¹²⁸ Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2010] OJ L335/43.

¹²⁹ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2014] OJ L93/17.

¹³⁰ See section III.B.iv of this paper.

¹³¹ eg Regulation 330/2010 (n 126), rec 2.

¹³² See esp Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU] [2003] OJ L1/1, Art 29(1)(2).

¹³³ In Case 56/65 *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH* (MBU) [1966] ECR 235.

relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability'.¹³⁴

Consequently, it is not sufficient to look at the contractual restraints in the agreement abstractly but they must be examined in the context in which they operate, encompassing an examination of the market shares and market power of the parties, the market context of the agreement and its effect on actual and potential competition.¹³⁵ In 'effect' cases, therefore, an adverse effect on consumer welfare (and consumer interests) is only established where, compared to the situation which would occur in the absence of the agreement, the competitive process is distorted in such a way that negative effects on prices (or other parameters of competition) can be expected. Whether such effects are probable is generally determined indirectly through an examination of the relevant market, the parties' position in that market and the terms of the contract.¹³⁶ The examination of the market thus focusses on *likely*, not actual, effects on consumers through negative effects on prices and other parameters of competition. Where such effects can be demonstrated the agreement will be prohibited unless the Article 101(3) legal exception applies: in particular, by establishing that consumers will benefit from other compensating efficiencies such as enhanced quality.¹³⁷

Unless the conditions of one of the block exemptions apply (see (iii) above), it is for those claiming the benefit of Article 101(3)¹³⁸ to establish that *all four*¹³⁹ of its criteria are satisfied:¹⁴⁰ (1) that the agreement achieves benefits—improvements in the production or distribution of goods or the promotion of technical or economic progress; (2) that a fair share of those benefits are passed on to 'consumers'; (3) that the agreement does not contain any indispensable restraints; and (4) that it does not eliminate competition in respect of a substantial part of the products in question. There is relatively little current jurisprudence providing clarification as to how these important criteria are interpreted. Consequently, the Commission's Guidelines on Article 101(3)¹⁴¹ and other Notices also provide helpful guidance to business, shedding light on how the Commission interprets the criteria. When considering how Article 101(3) affects the 'consumer', several important observations can be made.

First, the role of Article 101(3)¹⁴² is to determine whether benefits achieved by the agreement, or restrictive provisions, outweigh negative effects, so that the

¹³⁴ Art 101(3) Guidelines (n 4) para 24. This could be because the agreement restricts actual or potential competition between the parties or between any one of the parties and third parties that could have existed absent the agreement, *ibid*, paras 25–26. Alternatively, it will have to establish that the agreement restricts a supplier's distributors from competing with each other since potential competition that could have existed between the distributors absent the restraint is restricted.

¹³⁵ See Case C–234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I–935.

¹³⁶ Art 101(3) Guidelines (n 4), para 22.

¹³⁷ *ibid*, para 86.

¹³⁸ Regulation 1/2003 (n 132), Art 2.

¹³⁹ The requirements are cumulative, see Case T–528/93 *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission* [1996] ECR II–649, para 93 and Case T–65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II–4653, para 144, and Case C–68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa as*, judgment of 7 February 2013, paras 31–34.

¹⁴⁰ *Österreichische* (n 59), para 235.

¹⁴¹ See Art 101(3) Guidelines (n 4).

¹⁴² In early cases much of the Commission's analysis was focussed on Art 101(3), on account of the broad jurisdictional interpretation of Art 101(1). Despite this, published exemption decisions,

agreement is on balance pro-competitive:¹⁴³ that is, whether it achieves ‘appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition’.¹⁴⁴ The Commission’s current view is that the parties must demonstrate efficiency gains (that is economic benefits, not public policy benefits unless they are used to supplement the economic benefits which the agreement generates), cost efficiencies,¹⁴⁵ and qualitative efficiencies, creating value in the form of new or improved products (dynamic efficiencies),¹⁴⁶ which will result from the economic activity that forms the object of the agreement (ie there is a causal link between the agreement and the claimed efficiencies)¹⁴⁷ and that there is a pass-on of these efficiencies to consumers.¹⁴⁸

The Commission, reflecting the overarching consumer welfare goal, interprets the concept of the consumer broadly in this context to encompass:

all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, ie natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article [101(3)] are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.¹⁴⁹

The consumer in Article 101(3), as a recipient of off-setting efficiencies, is thus equated with the consumer whose benefit is secured by the consumer welfare objective as a whole. For this reason, this is a different consumer from the one who is the subject of consumer protection law or who is one of the actors in the internal market case law.¹⁵⁰ The final consumer *may* be a recipient of efficiencies but is not necessarily one of them or the only one.

Second, it is clear that not all individual consumers need to derive a benefit from the agreement for Article 101(3) to apply. Rather, ‘it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers.’¹⁵¹ This approach detaches the analysis of the consumer benefit condition from the effects of an agreement on any individual consumer, or particular group of consumers. The emphasis is placed on the effect of the agreement on consumers *overall*. It is

especially the early ones, did not contain particularly lengthy or sophisticated analysis of the Art 101(3) criteria.

¹⁴³ Art 101(3) Guidelines (n 4) para 33.

¹⁴⁴ *Consten & Grundig* (n 33), para 348; *Van den Bergh* (n 139) paras 101 and 139; and *MasterCard* (n 113) para 234.

¹⁴⁵ Art 101(3) Guidelines (n 4) paras 64–68.

¹⁴⁶ *ibid*, paras 69–72.

¹⁴⁷ *ibid*, para 45.

¹⁴⁸ *ibid*, paras 83–104.

¹⁴⁹ *ibid*, para 84.

¹⁵⁰ See section II.C of this paper.

¹⁵¹ Case C–238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I–11125, para 70. See also the recent decision of the Court in *MasterCard* (n 113), para 237.

significant that competition law bases this enquiry on factual considerations. By contrast, in other areas of EU law, legal constructs have been used to determine the parameters for the protection for consumers. For instance, the notion of the ‘average’ consumer has been widely used in free movement¹⁵² and consumer protection¹⁵³ law to determine legal standards of protection, and often it has been construed in the light of the objectives that the law has tried to achieve. The average consumer has thus been identified in these areas as a ‘reasonably circumspect and well informed consumer’;¹⁵⁴ consequently it is understood as embodying a highly competent consumer whose protection should interfere as little as possible with free trade and so trumps the more paternalistic national norms of consumer protection.¹⁵⁵

Third, ‘[t]he concept of ‘fair share’ implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article [101(1)].’¹⁵⁶ In other words, the net effect of the agreement must at least be neutral from the perspective of the consumers affected. A thorny issue in this context is whether the pass-on must compensate ‘those consumers directly or likely affected by the agreement’.¹⁵⁷ Although the view that all pro-competitive benefits in all markets should be relevant and weighed against the agreement’s anti-competitive effects gains some support from the Court, and, arguably, better accords with the overarching consumer welfare objective pursued,¹⁵⁸ in a recent judgment the Court held, in the context of a two-sided market (in which firms have to compete simultaneously for two groups of customers), that although the consumer benefits requirement relates to:

the beneficial nature of the effect on all consumers in the relevant markets ... in the case of a two-sided system ... it is necessary to take into account ... all the objective advantages ... not only on the market in respect of which the restriction has been established, but also on the market which includes the other group of consumers associated with that system.¹⁵⁹

¹⁵² See, eg Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-1923, para 24 and Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* [1998] ECR I-4657, para 31.

¹⁵³ See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (‘Unfair Commercial Practices Directive’) OJ [2005] L149/22, rec 18.

¹⁵⁴ *ibid.*

¹⁵⁵ See further C Barnard, *The Substantive Law of the EU*, 4th edn (Oxford, Oxford University Press 2013) 174–76.

¹⁵⁶ Art 101(3) Guidelines (n 4), para 85.

¹⁵⁷ Unless ‘the group of consumers affected by the restriction and benefiting from the efficiency gains [on a different market] are substantially the same’, Art 101(3) Guidelines (n 4) para 43. Only exceptionally therefore where markets are closely related, can efficiencies in separate markets be taken into account.

¹⁵⁸ See Case T-86/95 *Compagnie générale maritime and Others v Commission* [2002] ECR II-1011, para 343. See also eg, C Townley, ‘The Relevant Market: an Acceptable Limit to Competition Analysis?’ (2011) 32(10) *European Competition Law Review* 490 (arguing that the Commission’s rule against aggregating across markets runs contrary to the EU courts’ precedents, creates unacceptable uncertainty, undermines consumer welfare and risks distorting undertakings’ investment decisions).

¹⁵⁹ *MasterCard* (n 113), para 237.

However, benefits on one side of the market alone are not sufficient if the restrictive effects occur only on the other side and if the consumers in the two markets are not substantially the same.

A broad reading of the cases also suggests that all consumer benefits, whether current or future, should be taken into account, so both the short- and long-term effects of the agreement may be relevant to the assessment. Indeed, the Commission's Guidelines acknowledge that in assessing this overall impact, the efficiencies created by the agreement may only materialise in the future and that present loss to consumers may be compensated by future gain.¹⁶⁰ Clearly, however, even if future benefits to future consumers are relevant, it may be extremely difficult for the parties to provide convincing evidence that such benefits will result to consumers.¹⁶¹

(v) Abuse of a dominant position in Article 102 TFEU

a. Exploitative conduct: 'Unfair' pricing and price discrimination

An obvious objection to an undertaking holding a dominant position, or with market power, is its ability to 'exploit' its position and its customers and consumers in a way which would be impossible for an undertaking operating on a competitive market. Again, as was seen to be the case in the context of Article 101, the concern here is to prevent exploitation of a broad range of 'consumers', broadly encompassing those on the 'buyer' side of the market and not just final consumers.¹⁶² It is clearly the purpose of Article 102 to prevent such conduct as the provision refers specifically to ways in which market power may be exploited: for example, through 'imposing unfair purchase or selling prices or other unfair trading conditions' (Article 102(a)) or engaging in discriminatory behaviour, 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage' (Article 102(c)). Indeed, early on in the evolution of EU competition law it was questioned whether Article 102 went any further than protecting consumers from exploitation: whether it was *only* intended to forbid exploitative behaviour which harms consumers *directly*.¹⁶³

In 1972 in *Continental Can*, however, the Court, in a seminal judgment confirmed that Article 102 does not set out an exhaustive list of prohibited conduct¹⁶⁴ and that it *can* be applied to prohibit conduct affecting the structure of the market;¹⁶⁵ it

¹⁶⁰ *Compagnie générale maritime* (n 158), paras 87–88. See also paras 44 and 92.

¹⁶¹ See C Townley, 'Inter-generational Impacts in Competition Law: Remembering Those Not Yet Born' (2011) 32 *European Competition Law Review* 580 (arguing that aggregating across generations should be allowed).

¹⁶² See *Continental Can* (n 32), para 19, where there is a separation between 'consumers' denoting all customers of a dominant company and 'trade partners'.

¹⁶³ eg R Joliet, *Monopolization and Abuse of Dominant Position* (Boston, Nijhoff, 1970) and P Akman, 'Searching for the Long-Lost Soul of Art 82 EC' (2009) 29 *Oxford Journal of Legal Studies* 267.

¹⁶⁴ It has been argued that the width of Art 102(b) means that it should be the test for all exclusionary abuses: JT Lang, 'How Can the Problems of Exclusionary Abuses under Art 102 TFEU Be Resolved?' (2012) 37 *European Law Review* 136. In this case the Court accepted that a dominant undertaking could strengthen its position and eliminate competition by taking over a competitor. On the facts, however, it quashed the Commission's decision because it had failed adequately to define the market and, consequently, to show that the undertaking was dominant.

¹⁶⁵ *Continental Can* (n 32). See also *Le Problème de la Concentration dans le Marché Commun*, Etudes CEE, Série Concurrence No 3 (1966) esp paras 25–27.

applies to what are now referred to as ‘exclusionary’ abuses, as well as to exploitative ones, because such practices ‘cause consumers harm through their impact on competition’;¹⁶⁶ by having the actual or potential effect of foreclosing the market, such practices harm consumer interests *indirectly*. The rationale for prohibiting exclusionary conduct is therefore that by protecting the competitive process,¹⁶⁷ automatic benefits to consumers will be delivered, especially in the long term.

Indeed, something which might perhaps seem surprising to a consumer lawyer is that, following clarification from the Court that Article 102 applies to exclusionary conduct, *most* Article 102 competition law enforcement has focussed on such conduct. The Commission, like many other competition agencies, has rarely intervened in cases which purely involve ‘exploitative behaviour’. There is consequently a dearth of decisions and of guidance¹⁶⁸ relating to behaviour that is directly exploitative of, and specifically targets,¹⁶⁹ consumers.¹⁷⁰

In relation to ‘unfair pricing’ there may be several reasons for this recalcitrance on the part of competition agencies. First, any such intervention by a competition authority is extremely regulatory in nature and it is well known that there are acute difficulties involved in ascertaining when a price will be ‘excessive’—or as the Court explained, ‘one that has no reasonable relation to the economic value of the product supplied’.¹⁷¹ In addition, it is also questionable whether intervention of this type is desirable because of its potential to have a negative effect on the competitive process—and consumers—in the long run.¹⁷² In the US, for example, the courts have been reluctant to condemn ‘monopoly’ power thrust upon a firm or achieved through superior skill, foresight and industry.¹⁷³ On the contrary they have recognised that such market power provides the signal to attract new competition into the market¹⁷⁴ and a *reward* for innovation and the lawful winning of the competitive battle. In *Verizon Communications v Law Offices of Curtis v Trinko LLP*, Justice Scalia stated:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.¹⁷⁵

¹⁶⁶ *Post Danmark* (n 62), para 20.

¹⁶⁷ *ibid* and *T-Mobile* (n 114) Opinion of AG Kokott, para 58.

¹⁶⁸ See Commission, ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty [now Art 102 TFEU] to abusive exclusionary conduct by dominant undertakings’ (‘Guidance Paper’) [2009] OJ C45/7, para 5.

¹⁶⁹ *ibid*, para 7.

¹⁷⁰ Guidance Paper (n 168) is focused on exclusionary behaviour and only leaves open the possibility of future guidance on exploitative behaviour, see para 7.

¹⁷¹ See *United Brands Company* (n 81).

¹⁷² Three main conceptual challenges suggesting a cautionary approach to excessive pricing cases arguably are that the markets are self-correcting, the prohibition is tantamount to prohibiting the dominant position and that exploitative practices serve an important dynamic role, thereby increasing welfare, see M Gal, ‘Abuse of Dominance-Exploitative Abuses’ in I Lioanos and D Geradin (eds), *Handbook on European Competition Law: Substantive Aspects* (Cheltenham, Edward Elgar, 2013).

¹⁷³ In *United States v Aluminium Co of America (Alcoa)* 148 F 2d 416 (2d Cir 1945).

¹⁷⁴ *Berkey Photo Inc v Eastman Kodak Co* 603 F 2d 263, 294 (2d Cir 1979).

¹⁷⁵ *Verizon Communications v Law Offices of Curtis v Trinko LLP* 540 US 398 (2004).

Although, therefore, it may be accepted that such monopoly pricing harms customers of the dominant firm and consumers of their products in the short run (customers who do not value a product more than the cost of producing that product do not obtain it and static competition is reduced), it is accepted in the US that, in the long run, the conduct may make the market more competitive, by providing incentives both for innovation and new entry into the market.¹⁷⁶

In the EU, although ‘the [EEC] Founding Fathers’ faith in competition as a process of rivalry between competitors was not strong enough to tolerate customer/consumer exploitation in the short run’,¹⁷⁷ there are nonetheless only relatively rare examples of Commission decisions concerning behaviour that had a direct impact on customers or *final consumers*: usually where the case has another dimension—an exclusionary or internal market aspect¹⁷⁸ or where the interests of consumers cannot otherwise be ensured.¹⁷⁹ A good example is the 1999 Commission decision about the 1998 FIFA World Cup,¹⁸⁰ where the Commission investigated the arrangements relating to the sale of entry tickets to the 1998 FIFA World Cup. There, the Commission decided that the French body in charge of the organisation of the 1998 World Cup had abused its position of dominance in limiting markets to the prejudice of consumers by discriminating against consumers outside France because the purchase of entry tickets was conditional on the provision of a postal address in France and telephone reservations could only be made within metropolitan France. In this case, and as well as the harm suffered by consumers, the commitment of the competition rules to the ideal of a single market where there is no direct or indirect discrimination against foreign products or foreign nationals can also be seen in action. Similarly, although price discrimination is specifically targeted by Article 102, if a consumer welfare objective is pursued there may be good reasons for being cautious about enforcing Article 102(c) in the way that its wording suggests. Price discrimination is a common occurrence in markets as suppliers seek, where possible, to extract from each consumer the maximum that they are willing to pay and to reflect the different demand sensitivities of consumers. Although price discrimination might harm consumers in some circumstances (for example, by allowing a dominant firm to

¹⁷⁶ In the EU it has also been argued that a policy of non-intervention in cases of monopoly pricing should be adopted: both because the competition authority is not qualified to determine what price is appropriate and because the policy would reduce, and possibly forego, the chance to protect consumers in the future by competition rather than policy intervention, see eg J Gual and others, ‘Report by the EAGCP – An Economic Approach to Article 82’ (July 2005) 11.

¹⁷⁷ L Gyselen, ‘Rebates: Competition on the Merits or Exclusionary Practice?’ in CD Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* (Oxford, Hart Publishing, 2006) 290.

¹⁷⁸ eg Commission Decision of 29 April 2014 in Case AT.39985 – Motorola – Enforcement of GPRS standard essential patents, [2014] OJ C 344/6 and Case 26/75 *General Motors v Commission* [1975] ECR 1367.

¹⁷⁹ eg Guidance Paper (n 168), para 7.

¹⁸⁰ Commission Decision of 20 July 1999 in Case 36888 *1998 Football World Cup* [2000] OJ L5/55. See also eg *Football Association* (n 34) paras 108–109 (the Court made clear that the ownership of an IPR does not necessarily guarantee the right for the owner to demand the highest possible remuneration—only appropriate remuneration which must be reasonable in relation to the economic value of the service provided), Case 238/87 *AB Volvo v Erik Veng* [1988] ECR 6211 and the Commission’s investigation into prices in mobile telephone services in the EC (Press Releases IP/98/141, IP 98/707, IP (98) 1036).

exclude competitors, to diminish consumer choice¹⁸¹ or to protect their dominant position and so damage the competitive process) where price discrimination is used as a mechanism to enable a firm to increase output by charging each customer its reservation price (and not to decrease output like other monopolistic practices),¹⁸² the practice may benefit consumers that might not otherwise have been able to purchase the product, even though it might harm traders by putting one at a disadvantage vis-à-vis another. A problem inherent in Article 102(c) is that its wording does not seem to require ‘welfare losses’ but appears designed not only to prevent sellers from impairing the competitive position of competitors through price-cutting tactics (primary line injury), but to target the harm occasioned when competition is distorted between buyers and by favouring powerful buyers over smaller buyers without such effective buyer power (secondary line injury), whether or not such conduct is likely to harm consumers downstream. Article 102(c) has undoubtedly been relied upon and applied broadly by the Commission. In recent years, however, it has indicated that it will focus its resources on primary line injury, conduct which unlawfully excludes competitors and allows the dominant firm to acquire or strengthen its dominant position. Indeed, in its 2009 Guidance Paper on enforcement priorities the Commission only sets out its priorities in relation to exclusionary conduct and repeatedly emphasises that it will focus on the types of conduct that are most harmful to consumers.¹⁸³

b. Exclusionary conduct

A majority of EU jurisprudence therefore focuses on exclusionary conduct which

through recourse to methods different from that which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.¹⁸⁴

The case law draws a vital distinction between competition on the basis of performance, or competition on the merits, and abusive exclusionary conduct. Where there is *prima facie* evidence of such exclusionary behaviour, the burden of demonstrating that the practice is objectively justified or that it produces efficiencies that ensure no net harm is likely to arise for consumers—and hence to show that Article 102 should not apply—will fall on the dominant company.¹⁸⁵ Complexity is inherent in these assessments in distinguishing between unlawful exclusionary behaviour and legitimate competition¹⁸⁶ and determining whether such conduct is

¹⁸¹ See Nihoul, ‘Freedom of Choice’ (n 52).

¹⁸² Bork, *The Antitrust Paradox* (n 17) 394–98 (‘If discrimination increases output, it tends to move resource allocation and value of marginal product toward that which would obtain in a competitive industry. A decrease in output has the opposite effect. The impact of discrimination on output, therefore, may be taken as a proxy for its effect on consumer welfare’, 395).

¹⁸³ See Guidance Paper (n 168), para 5.

¹⁸⁴ *Hoffmann-La Roche* (n 7), para 91.

¹⁸⁵ See Guidance Paper (n 168), paras 28–31 and also Case C–95/04 P *British Airways plc v Commission* [2007] ECR I–2331, para 86 and *TeliaSonera* (n 9), para 76.

¹⁸⁶ In this context, the Commission and the Court were consistently criticised for adopting a ‘form’ based approach, which inferred that certainly types of conduct were automatically abusive. In more

liable to harm consumer interests and in determining whether any justification for the conduct exists.

The question of how to construct rules to identify and condemn exclusionary behaviour that harms competition and consumers and to differentiate it from competitive conduct in a way which is both sufficiently clear and accurate—so minimising both Type 1 and Type 2 errors—has proved a major challenge.¹⁸⁷ The tendency in the EU has been for the distinction to be drawn through the use of conduct-specific tests. It has often been complained, however, that the EU authorities have been too ready to assume that conduct which may foreclose competitors and/or which may limit individual freedom or equality of opportunity between economic operators and their freedom to compete is abusive (without a need to demonstrate prejudice to consumers) and have consequently imposed too great a responsibility towards the competitive process on the shoulders of dominant firms and set the bar for establishing an abuse of Article 102 too low. In consequence, it has been argued that the tests drawn for identifying abuse may be over-inclusive, deterring dominant firms from engaging in aggressive and legitimate conduct, especially low price competition on the merits which might benefit consumers.¹⁸⁸ Consequently, there is a risk that hardnosed competition, which may benefit consumers, may be deterred and less-efficient competitors protected.

The Commission has sought to meet this type of criticism by ‘modernising’ its approach to Article 102¹⁸⁹ publishing first, in 2005, a DG Comp Staff Discussion Paper on the Application of Article 82 [102 TFEU] of the Treaty to Exclusionary Abuses¹⁹⁰ and subsequently, in 2009, Guidance on its Enforcement Priorities in Applying Article 82 [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings (the ‘Guidance Paper’).¹⁹¹ The new approach set out in the Guidance Paper does not purport to contain a statement of the law (rather, at times it is in clear tension with it) but conveys the Commission’s determination to focus enforcement only on cases where the exclusionary conduct of the dominant firm impairs effective competition by ‘foreclosing their competitors in an anticompetitive way, thus having

recent years and particularly following the adoption of the 2009 Guidance Paper (n 168) the Commission has moved to an approach that focuses more on the actual anti-competitive effects of the behaviour of the dominant company.

¹⁸⁷ ‘Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike’: see FH Easterbrook, ‘When is it Worthwhile to Use Courts to Search for Exclusionary Conduct?’ [2003] *Columbia Business Law Review* 345, 346.

¹⁸⁸ Those taking the view that exclusionary conduct is rare, that conduct by single-firms frequently has efficiency potential, may believe that too expansive liability will lead to Type 1 errors and chill aggressive behaviour, keep prices high, discourage innovation and encourage less efficient rivals to misuse the competition rules when losing out in the competitive battle, see eg Bork, *The Antitrust Paradox* (n 17). Others, however, may be more concerned about Type 2 errors and to ensure that rules do not allow dominant firms to place rivals at a disadvantage, to raise their costs, so as to preserve their position of dominance and allow for the exercise of market power, see, eg TG Krattenmaker and SC Salop, ‘Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price’ (1986) 96 *Yale Law Journal* 209.

¹⁸⁹ This reform followed its overhaul of the working and application of Art 101 and the EUMR.

¹⁹⁰ Commission, ‘Abuse of dominant position (Article 102 TFEU)’ <<http://ec.europa.eu/competition/antitrust/art82/index.html>> accessed 2 February 2015.

¹⁹¹ Guidance Paper (n 168).

an adverse impact on consumer welfare’;¹⁹² that is, to focus ‘on safeguarding the competitive process’ whilst being mindful of the fact ‘that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market’.¹⁹³

This is not an easy task, however, particularly in the area of pricing, where it is difficult to distinguish between aggressive competition through low pricing (which ordinarily benefits consumers and is promoted by competition law) and low pricing which unlawfully excludes competitors from the market and may damage consumers in the longer run. In determining whether low pricing by a dominant firm should be found abusive, relevant inquiries may be whether an equally efficient competitor¹⁹⁴ can compete (in particular, whether the dominant firm is pricing below its costs) and whether that conduct is liable to produce anticompetitive effects and harm consumers. Another important issue is whether, and if so when, presumptions of illegality should be used. It has been seen that in *Groupeement des Cartes Bancaires* the Court of Justice stressed, in the context of Article 101, that the category of agreements restrictive of competition by object must be interpreted restrictively and applied only to situations where an agreement inherently reveals a ‘sufficient degree of harm to competition’.¹⁹⁵

In relation to Article 102, the Commission states in its Guidance Paper that anti-competitive effects do not need to be demonstrated in the case of conduct ‘that can only raise obstacles to competition and ... creates no efficiencies’;¹⁹⁶ such practices are, by their very nature, abusive unless the dominant firm can raise a valid objective justification for its conduct. In the context of pricing, the Court has held (recognising the relevance of the equally efficient competitor) that where a dominant firm engages in predatory pricing, pricing below its average variable costs (AVC), the abusive nature of such conduct is presumed, as the conduct has ‘no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking’.¹⁹⁷ This presumption is arguably justifiable for if the dominant firm is not covering its variable costs it makes no sense for it to be selling extra units.¹⁹⁸

In *Post Danmark*, the Court confirmed that, conversely, Article 102 does not prevent an undertaking from acquiring, on its own merits, a dominant position and does not seek to ensure that:

competitors less efficient than the undertaking with the dominant position should stay on the market ... Competition on the merits may, by definition,

¹⁹² Guidance Paper (n 168), para 19. Anticompetitive foreclosure is defined as ‘a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers’. See also eg *Lowe*, ‘Consumer Welfare and Efficiency’ (n 38).

¹⁹³ Guidance Paper (n 168), para 6.

¹⁹⁴ eg Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-03359 and Case C-280/08P *Deutsche Telekom AG v Commission* [2010] ECR I-9555.

¹⁹⁵ *Groupeement* (n 63), para 58.

¹⁹⁶ Guidance Paper (n 168), para 22.

¹⁹⁷ Case C-333/94P *Tetra Pak v Commission* (*‘Tetra Pak II’*) [1996] ECR I-5951 para 41.

¹⁹⁸ eg B Allan ‘Article 82: A Commentary on DG Competition’s Discussion Paper’ (2006) 2 *Competition Policy International* 42, 57.

lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.¹⁹⁹

Nonetheless, there are some circumstances in which EU condemns pricing practices even where it has not been established that they may exclude equally efficient competitors; for example, where the conduct is designed to ensure exclusivity, so tying customers to the dominant firm, limiting customer choice and restricting competitors' access to the market.²⁰⁰ A controversial issue in this situation is, however, how a claimant must demonstrate that the conduct of the dominant undertaking is likely to exclude competition or damage the competitive structure in a way that is detrimental to *consumers* (that is to say, how must prejudice to consumers be demonstrated?) and in particular exactly when a presumption of anticompetitive effects can be relied upon.²⁰¹

Even where anticompetitive effects are not assumed proof of actual anticompetitive effect or a high probability that such an effect will arise is generally not required under Article 102 (as is the case in the context of Article 101). Rather, the anticompetitive effects of a dominant firm's conduct tend to be presumed where proof of anticompetitive effects 'which may potentially exclude competitors'²⁰² and eliminate effective competition is demonstrated. Critics complain that this means that the interests of consumers under Article 102 are too remote. The judgments, however, appear to prefer a construction of Article 102 that will ensure that the process of competition and rivalry between firms is preserved and protected.²⁰³

Third, like Article 101, Article 102 frequently requires a balance to be achieved between the protection of long- and short-term consumer interests.²⁰⁴ In

¹⁹⁹ *Post Danmark* (n 62), paras 21–22.

²⁰⁰ See Case T–286/09 *Intel Corp v Commission*, judgment of 12 June 2014.

²⁰¹ In *Intel* (ibid) one important issue raised by the case is whether it is justifiable to apply a presumption of illegality in the context of loyalty rebates even though the dominant firm may be pricing *above* cost and a voluminous literature records possible pro-competitive rationales for them; see eg P Ibáñez Colomo, 'Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy' *LSE Law, Society and Economy Working Papers* 29/2014; P Nihoul, 'The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law?' (2014) 5 *Journal of European Competition Law and Practice* 521; J Venit, 'Case T–286/09 *Intel v Commission* – The Judgment of the General Court: All Steps Backward and No Steps Forward' (2014) 10 *European Competition Journal* 203; R Whish, 'Intel v Commission: Keep Calm and Carry On!' (2014) *Journal of European Competition Law and Practice*; W Wils, 'The Judgment of the EU General Court in Intel and the So-Called "More Economic Approach" to Abuse of Dominance' (2014) 37 *World Competition: Law and Economics Review* (forthcoming) and articles by A Jones & B Sufrin, D Crane, B Allan, C Ahlborn & D Piccinin, M Dolmans & T Graf and D Neven in 'Symposium: Intel' [2015] 1(1) *Competition Law & Policy Debate* 28–96.

²⁰² *TeliaSonera* (n 9), para 64. Rather, to ensure that the evidentiary burden on claimants is not placed too high, the test appears to require it to be demonstrated that 'in a manner tailored to the specificities and facts of each case, that a particular practice 'tends' to restrict competition in the sense that it has the potential to hinder competition. It must thus be demonstrated that it is plausible that the practice harms or will harm competition. Abstract, purely hypothetical or remote assertions or theories of harm, which are not linked to the specificities of the case at hand, will thus not suffice', *AstraZeneca* (n 76) Opinion of Mazák AG, paras 62–63.

²⁰³ L Lovdahl Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 *European Competition Journal* 329, 337.

²⁰⁴ See further on this point, S Haukka, 'Consumer Protection and EU Competition Law' in *EU Competition Law in Context* (Oxford, Hart Publishing, 2009) 131, 142.

many of the leading judgments of the Court on exclusionary behaviour, the long-term effects on consumer interests play an important role.²⁰⁵ For example, in the context of predatory pricing, it has been seen that it is assumed that a dominant firm which prices its products so low that it is not even covering the marginal cost, or average variable cost, of producing that output commits an abuse of a dominant position. Although it might therefore seem peculiar for competition law to condemn low pricing, one of the very virtues it promotes, the conduct is prohibited as it is presumed that it will exclude equally efficient competitors from the market, deter competitors from entering the market and, after the predatory siege has ended, permit the dominant firm to raise prices and recoup the losses made. Conversely, in some cases competition law will not compel a dominant firm to engage in conduct which would increase competition in the short term (for example, to supply, or to continue to supply, a product which a competitor needs to compete) if, in the longer run, it might discourage innovation by the dominant firm or the competitor.

IV. ENFORCEMENT OF THE COMPETITION RULES AS A TOOL TO PROTECT CONSUMER INTERESTS AND GAPS AND LACUNAS

The previous sections have considered the role that the consumer plays in framing the objectives of EU competition law and how those goals have shaped the interpretation of the substantive law. The goals are also crucial, however, to the question of how the laws should be *enforced*. Enforcement actions are, of course, necessary for the substantive law to be clarified and developed, and to ensure that the rules are effective and achieve their overarching objective—in particular, that consumers are protected by ensuring that violations are brought to an end, future violations are deterred and that consumers are compensated for any loss suffered as a consequence of infringements.²⁰⁶ Where a consumer welfare goal is adopted, therefore, important questions are: how should the interests of ‘consumers’, or particular groups of consumers, have an impact upon public enforcement (for example, in setting enforcement priorities of public enforcement agencies and in determining the role that consumers should play in public enforcement processes)? And should private enforcement, which involves, direct action by consumers to safeguard their own interests, be encouraged? The enforcement arena consequently provides an additional, and more practical, setting for determining how consumer interests should be protected and must, therefore, be referred to in this chapter.

In the EU, although, historically, competition rules were enforced principally by the Commission, a more decentralised system has now emerged, involving a network of competition authorities: the European Competition Network, comprising the Commission and national competition authorities (NCAs),²⁰⁷ and the courts and

²⁰⁵ eg Case T–201/04 *Microsoft Corp. v Commission* [2007] ECR II–3601 in relation to tying practices or the case law on predatory pricing (eg Case T–340/03 *France Télécom SA v Commission* [2007] ECR II–107).

²⁰⁶ See W Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32 *World Competition* 3 and Commission, ‘Green Paper on Damages actions for Breach of the EC Antitrust Rules’ COM (2005) 672 final, s 1.1 on the common aims and relationship of complementarity between the public and private systems of enforcement.

²⁰⁷ Although NCA’s have, since 2004, started to perform an ever increasing and important role in EU antitrust enforcement, the Commission has sought to retain its central position ‘as the guardian of the Treaty’ which ‘has the ultimate but not the sole responsibility for developing policy and safeguarding

tribunals of the individual Member States (the national courts). Consumers benefit both directly and indirectly from the interplay between these two levels of enforcement. Indeed, in the past few years important developments have taken place that are designed to put in place a more effective system of enforcement. These developments have yielded the image of a stronger and more empowered consumer.

On the one hand, most competition law systems depend, to a greater or lesser extent, upon public enforcement. In the EU, the Commission and NCAs focus principally on ensuring that violations are brought to an end and deterred, not on ensuring compensation for victims;²⁰⁸ the Commission does not have power to award damages to those who have suffered loss, although it is seen below that it has been active in trying to facilitate private actions by victims for compensation. The questions of how competition agencies can best deter infringements, how public enforcement should be divided between the Commission and NCAs and how public enforcement relates to private enforcement are complex ones with their own rich body of literature. However, three important points are drawn out here.

First, enforcement by the Commission follows an integrated administrative model;²⁰⁹ in proceedings under Articles 101 and/or 102 it acts, pursuant to powers conferred on it by Regulation 1/2003²¹⁰ and Regulation 774/2003 (the Implementation Regulation),²¹¹ as an integrated decision-maker, deciding which cases to investigate, whether to initiate proceedings, whether an infringement has occurred and what sanctions should be imposed on undertakings in breach. A noteworthy feature of this process is that interested natural or legal persons that can show a 'legitimate interest' may take part in it in a number of ways: for example, by submitting complaints to the Commission,²¹² with the objective of triggering an investigation (the Commission is not obliged to act on a complaint, however, and may reject it if, following an examination, it decides that the case does not raise sufficient EU (or public) interest),²¹³ or submitting observations in the course of the Commission proceedings.²¹⁴ The modernisation reforms strengthened the role of complainants by encouraging them to inform the Commission about suspected infringements and, importantly, by clarifying the parameters that inform the submission of a complaint, as well as the procedural rights of the complainant. In particular, the 2004 Commission Notice on the Handling of Complaints²¹⁵ endorsed the view that not only

consistency when it comes to the application of [EU] competition law', Commission, 'Notice on cooperation within the Network of Competition Authorities' [2004] OJ C101/43, para 43.

²⁰⁸ But see eg the (then) UK competition authority's OFT Press Release 88/06 'Independent Schools agree settlement' 19 May 2006 (where the OFT accepted a settlement whereby the schools which had engaged in price fixing agreed to make an ex gratia payment into a fund for the benefit of the victims of the infringement) and the provisions on voluntary redress in the Consumer Rights Act 2015, Schedule 8.

²⁰⁹ See generally Jones and Sufrin (n 101) chs 13 and 15.

²¹⁰ The model was first set up by Regulation 17 of 1962 ([1959–1962] OJ Sp Ed 87) and is now set out in Regulation 1/2003 (n 132).

²¹¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty ('Conduct of Proceedings Regulation') [2004] OJ L123/18.

²¹² They may also lodge complaints with NCAs.

²¹³ See Regulation 1/2003 (n 132) Art 7(2).

²¹⁴ See Regulation 773/2004 (n 211), Art 6 and more generally Arts 5–9.

²¹⁵ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [now Arts 101 and 102 TFEU] [2004] OJ C 101/65.

undertakings, trade and consumer associations²¹⁶ but also individual consumers²¹⁷—and here this term seems to be used as a synonym of final consumers—whose economic interests are directly and adversely affected by anti-competitive practices can be held to show a legitimate interest. This view, emphasising the position of final consumers as complainants that may set off the process of public enforcement of the Competition rules, has been upheld by the General Court in its case law. Indeed, in *Österreichische Postsparkasse AG*,²¹⁸ the General Court affirmed the broad interpretation of those having a legitimate interest and confirmed that it extends to final consumers who can demonstrate that their economic interests have been harmed. It may be recalled that this judgment was controversial in terms of the discussion on the objectives of EU competition law because it was one of the few cases where the General Court adopted an interpretation favouring a narrow consumer welfare objective and thus adopted an approach that closely resembled the position taken by the Commission in the aftermath of the process of modernisation.²¹⁹ Although later case law of the Court of Justice does not so clearly support this goal,²²⁰ the strong endorsement of the final consumer as a complainant that can trigger the Commission investigation remains entrenched in the case law.

Second, not only does the Commission seek, when enforcing Articles 101 and 102, to ensure that infringements are brought to an end, but it is intent on deterring the most serious violations of the competition law rules which cause widespread harm to consumer welfare (such as cartels and serious abuses of a dominant position²²¹). To facilitate this, Regulation 1/2003 confers broad powers of investigation and enforcement upon the Commission, which are recognised by the case law,²²² which it uses to ascertain the existence of potential violations of the EU competition rules. Furthermore, it confers power upon the Commission to: adopt decisions finding an infringement²²³; impose, subject to the principle of proportionality, remedies to ensure that the relevant undertakings bring the infringement to an end (through this issue of a cease and desist order and/or the imposition of other remedies); and fine undertakings that are found to be in breach of Articles 101 and 102, up to 10% of the undertaking's turnover in the preceding year.²²⁴ The levels of fines—especially in relation to cartel activity²²⁵—have been increasing steadily within this band, especially since the publication of the (current) 2006 Guidelines on the method of setting fines.²²⁶ Although these fines do not provide redress for consumers, the Commission action benefits consumers both by ensuring that that infringement is

²¹⁶ See Case T-37/92 *Bureau Européen des Unions de Consommateurs and National Consumer Council v Commission* [1994] ECR II-285.

²¹⁷ See the Commission Notice on the handling of complaints (n 215), para 37.

²¹⁸ See Joined cases T-213-214/01 *Österreichische Postsparkasse* (n 59), paras 113–14. The General Court thus emphasised that promoting the rights of consumers as complainants contributed to the attainment of the objectives of competition law, para 115.

²¹⁹ See section II.C of this paper and especially (n 63).

²²⁰ Again, see section II.C of this paper.

²²¹ See sections III.B.ii and v of this paper.

²²² eg Case 374/89 *Commission v Kingdom of Belgium* [1991] ECR I-3283, para 22.

²²³ The Commission also has power to adopt non-infringement and commitment decisions, see Regulation 1/2003 (n 132), Arts 10 and 9.

²²⁴ See Regulation 1/2003 (n 132) Arts 7 and 23(2) and further Commission, 'Guidelines on the method of setting fines imposed pursuant to Art 23(2)(a) of Regulation No 1/2003' [2006] OJ C210/2, para 32.

²²⁵ eg the fines of €1.47 billion imposed in December 2012 on the producers of TV and computer monitor tubes for two decade-long cartels (Commission Press Release, IP/12/1317).

²²⁶ *ibid* (n 224).

brought to an end and through precluding future anti-competitive behaviour that might be harmful to them. Indeed, the Commission has stressed that the purpose of these fines is two-fold deterrence: both ‘specific’ deterrence—by sanctioning the undertakings in question—and ‘general’ deterrence—through deterring other undertakings from breaching the competition rules.²²⁷ In the cartel context, the Commission, like many other competition enforcement agencies around the world, has sought to deter cartel activity not only through increasing sanctions for those found to have been involved in such activity but by simultaneously utilising a leniency regime as an important anti-cartel enforcement tool which serves to destabilise cartels and to encourage a ‘race to confess’.²²⁸ Essentially, if certain conditions are fulfilled, the first undertaking to submit relevant evidence to the Commission is offered immunity and others that cooperate are offered the possibility of reduction in fines.

Third, exactly how a competition authority uses its scarce resources to prioritise cases also has an important impact upon the question of which consumers are benefited. One of the concerns driving the introduction of a decentralised system of enforcement of Articles 101 and 102 was to allow the Commission to focus on the most serious violations of Competition law.²²⁹ Many competition authorities, including the Commission, devote significant resources to the detection and punishment of cartels. Often these relate to products, for example lysine or vitamins, which are not purchased by final consumers. Nonetheless, they cause harm to customers (such as farmers) who in turn may pass price increases down to consumers—so it is generally assumed that the harmful effects of such illegal price fixing cascade down to consumers. In some other cases, however, the Commission, NCAs (particularly those integrating consumer protection functions) and/or appeal courts, have shown in their decisional practice and judgments a direct focus on conduct which has an impact upon final consumers²³⁰ or particular groups of consumers, such as vulnerable consumers.²³¹

On the other hand, private civil actions may provide direct remedies to, and compensation for, victims of competition law infringements. They are therefore a mechanism for directly protecting consumers by allowing them to bring proceedings

²²⁷ See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [2013] OJ C167/19, para 1. Despite very high corporate fines there is some concern that even these may not be sufficient to deter the most serious violations—such as cartel activity. Some advocate that individual sanctions—and even criminal sanctions—may be required, see eg discussion of this issues in A Jones and R Williams, ‘The UK Response to the Global Effort against Cartels: Is Criminalization Really the Solution?’ (2014) *Journal of Antitrust Enforcement* 100.

²²⁸ Commission, ‘Notice on immunity from fines and reduction of fines in cartel cases’ [2006] OJ C298/11. Since 2008, the Commission has also sought where possible to dispose of cartel cases rapidly through reliance on a formal settlement procedure; Commission, ‘Notice on the conduct of settlement procedures’ [2008] OJ C167/1.

²²⁹ See Regulation 1/2003 (n 132), rec 3.

²³⁰ See, eg *Price-fixing of Replica Football Kit*, decision of the OFT of 1 August 2003 [2004] UKLR 6 and *Hasbro UK Ltd/Argos Ltd/ Littlewoods Ltd*, decision of the OFT of 2 December 2003 [2004] UKLR 717, and the decisions of the Competition Appeal Tribunal in Cases 1021/1/03 and 1022/1/03 *JJB Sports v OFT* [2004] CAT 17 and Cases 1014 and 1015/1/03 *Argos Ltd v OFT* [2004] CAT 24.

²³¹ See the decision of the Competition Appeal Tribunal in Case No 1044/2/1/04 *JJ Burgess and Sons v Office of Fair Trading and W Austin and Sons and Hardwood Park Crematorium Ltd and Consumers’ Association* [2005] CAT 25, paras 320 ff and esp para 335 on the vulnerability of the consumers involved.

which will result in infringements being brought to an end and/or reparation being provided for the harm that they have suffered as a result of anti-competitive practice. Furthermore, private litigation has an additional beneficial indirect effect on consumer interests by deterring future infringements and ensuring compliance with the competition rules.²³² A number of important reforms have taken place over the past few years in the context of private enforcement with the objective of strengthening the position of the consumer as an enforcer of the EU Competition rules before the national courts.

Early on in its jurisprudence, the Court recognised that Articles 101(1), 101(2) and 102 were directly effective, and hence could be enforced by private parties before the national courts.²³³ Despite this recognition, however, a very limited culture of private enforcement was prevalent, partly due to the centralised system of enforcement that applied before the enactment of Regulation 1/2003.²³⁴ Alongside the process of modernisation, the main impulse for the development of private enforcement of the EU rules followed from the decisions of the Court in *Courage v Crehan*²³⁵ and *Manfredi*,²³⁶ where the Court recognised that a private party that suffers harm as a result of anti-competitive behaviour has a right to compensation, *as a matter of EU law*. Although the volume of private litigation has begun to grow dramatically in some Member States, such as the UK, Germany, and the Netherlands, the EU as a whole continues to present a stark contrast to the US where there is a culture of antitrust litigation and where a large proportion of competition cases are litigated privately.²³⁷ Indeed, because the procedural and substantive rules governing these claims are regulated by national law, private litigation is being hampered by a multiplicity of differing obstacles which vary from jurisdiction to jurisdiction and by a lack of clarity over the question of what demands and constraints the EU law principles of effectiveness and equivalence impose on those national rules. For example, it is unclear whether the principles of effective judicial protection and of effectiveness of EU law, stressed in the Court's *Crehan* and *Manfredi* judgments, requires that indirect purchasers (as well as direct purchasers) should have standing to bring antitrust proceedings and/or whether defendants should be able to raise a defence that a claimant should be denied recovery on the grounds that it has passed on an overcharge to its customers.

The answer to this question would appear to depend on how the principle of effectiveness is to be interpreted and, specifically, whether it suggests that the principal purpose of private enforcement is the attainment of corrective justice, with

²³² See the Communication of the Commission on quantifying harm in actions for damages (n 227) para 2. See A Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3 *The Competition Law Review* 1, 9; R Nazzini and A Nikpay, 'Private Actions in EC Competition Law' (2008) 4 *Competition Policy International* 107, 109.

²³³ Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* [1974] ECR 51, para 15.

²³⁴ The fact that national courts and NCAs could not apply TFEU, Art 101(3) prior to the Competition Rules Regulation coming into force meant that it was hard for them to participate in a comprehensive way in the enforcement process, see, eg Jones and Sufrin (n 101) ch 14.

²³⁵ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd* [2001] ECR I-6297.

²³⁶ Cases C-295-297/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619.

²³⁷ eg W Kolasky, 'Antitrust Litigation: What's Changed in Twenty-Five Years' (2012) 27 *Antitrust* 9 and B Rodger (ed), *Comparative Private Enforcement and Collective Redress Across the EU* (Alphen, Kluwer Law International, 2014).

deterrence operating merely as a socially beneficial by-product of such actions, or whether private enforcement is simply a tool to increase enforcement, deter violations and punish violators.²³⁸ If the Court were to elevate the deterrent function of private enforcement higher than its ‘compensation function’ it might accept the compatibility with EU law of national rules which concentrate antitrust claims in the hands of those most likely to sue, for example, direct purchasers, and simplify antitrust actions for damages, for example, by precluding a passing on defence.²³⁹ Such an approach might ensure that strong incentives to sue²⁴⁰ are provided and that difficult issues of remoteness and tracing of injury are avoided. In contrast, if it were to elevate the compensation function over the deterrent one, it may require national law to ensure compensation to *any* claimant (whether a direct or indirect purchaser) who has suffered loss in consequence of anti-competitive activity and permit rules which deny recovery to claimants that have passed loss down the chain.

In 2013, the Commission published a package of measures designed to remove this type of uncertainty and the principal obstacles to full compensation for antitrust victims and to ensure that private and public enforcement operate harmoniously together.²⁴¹ This comprised the proposal of an EU Directive on Antitrust Damages actions,²⁴² a Recommendation on common principles for injunctive and compensatory collective redress,²⁴³ and a Communication on the quantification of harm for damages.²⁴⁴ All of these initiatives indicate a new layer of protection of consumer interests at the level of enforcement. For instance, the Directive, which was adopted in November 2014 and has to be transposed by Member States into their national laws by 27 December 2016, emphasises the principle of *full* compensation for any natural or legal person who has suffered harm—even if they had not purchased directly from

²³⁸ eg P Nebbia, ‘Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?’ (2008) 33 *European Law Review* 23, 28; K Roach and MJ Trebilcock, ‘Private Enforcement of Competition Laws’ (1996) 34 *Osgoode Hall Law Journal* 461, 496; F Hoseinian, ‘Passing-on Damages and Community Antitrust Policy – An Economic Background’ (2005) 28 *World Competition* 3, 7; R Nazzini, ‘The Objective of Private Remedies in EU Competition Law’ (2011) 4 *Global Competition Litigation Review* 131, 139–40.

²³⁹ See the approach of the US Supreme Court in *Hanover Shoe Inc v United Shoe Machine Corp* 392 US 481 (1968) and *Illinois Brick Co v Illinois* 431 US 720 (1977).

²⁴⁰ In contrast, provision for apportionment of recovery through the distribution chain, increases the overall costs of recovery through injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group.

²⁴¹ See N Dunne, ‘The Role of Private Enforcement within EU Competition Law’ (2013–14) 16 *Cambridge Yearbook for European Legal Studies* 143, for a thorough examination of these recent reforms.

²⁴² Commission, Proposal for a Directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the Competition law provisions of the Member States and the European Union COM (2013) 404 final. On 17 April 2014, the Parliament adopted a text of the directive that was agreed between the Parliament and the Council and which included some amendments to the original Commission proposal. The Directive was formally adopted in November 2014, see Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

²⁴³ Commission, Recommendation of 11 June 2013 on Common principles for injunctive and compensatory redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60.

²⁴⁴ Commission, Communication on quantifying harm in actions for damages (n 227).

the undertaking or undertakings infringing competition law.²⁴⁵ It also creates a rebuttable presumption that cartels cause harm.²⁴⁶ Although the Directive does not attempt to adopt a complete harmonised framework, it incorporates provisions relating to: discovery (so claimants will have easier access to evidence); protection of leniency and settlement documents; joint and several liability (for any participant in an infringement subject to certain exceptions for recipients of immunity and small and medium sized enterprises); the effect of NCA decisions; establishment of clear limitation periods; the legal consequences of passing on (the Directive establishes a rebuttable presumption that indirect purchasers suffer some level of overcharge harm); and consensual dispute resolution.

Likewise, the Commission hopes that the introduction of a set of common principles in the field of collective redress will help to ensure that effective compensation is obtained in mass harm situations; consequently, it might result in a more empowered consumer who is able, by joining claims with others, to get access to justice and pursue infringements of competition law, particularly where the cost of individual action may otherwise have acted as a deterrent.²⁴⁷ As however, the recommendation is that collective redress systems should, as a general rule, be based on the 'opt-in' principle (under which claimant parties are formed through directly expressed consent of their members), there is some concern that such classes will encompass only a small percentage of the antitrust victims.²⁴⁸

Finally, the Commission's guidance on quantifying harm is principally intended to bolster the effectiveness of the right to compensation.²⁴⁹ As former Commissioner Almunia explained, this new legislation seeks to 'democratise' enforcement by making damages actions more readily available to victims of anti-competitive practices.²⁵⁰ The final consumer is clearly a prominent beneficiary of these initiatives alongside other victims of anti-competitive practices in the production and distribution chain.

Private and public enforcement are thus closely connected. In particular, both systems work towards the protection of consumer interests and the empowerment of consumers. Public enforcement actions have a facilitating effect on private enforcement; a Commission decision finding a competition law infringement may be

²⁴⁵ See Antitrust Damages Actions Directive (n 242) Art 3. See also further, the recent decision of the Court in Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG*, judgment of 6 June 2014, which has held that a national ban on damages for customers of a undertaking that is not party to a cartel but which has benefitted from the conditions of umbrella pricing created by the cartel and has set prices higher than expected under competitive conditions is contrary to Art 101.

²⁴⁶ See Antitrust Damages Actions Directive (n 242) rec 47 and Art 17(2).

²⁴⁷ See the Commission, 'Recommendation on collective redress' (n 243) rec 9. This rationale also applies to other areas of EU and hence why the principles of the Commission Recommendation are not solely applicable in the field of competition law but also horizontally to consumer protection, environmental protection, data protection, financial services and other areas where claims for injunctions or damages in respect of breaches of EU law are relevant, rec 7.

²⁴⁸ See R Lande, 'The Proposed Damages Directive: The Real Lessons from the United States' March 2014 *CPI Antitrust Chronicle* 2, 6 (recovery in the EU will also be severely limited if lawyers are not allowed to receive contingency fees; 'the vast majority of consumer-victims and small business-victims' may therefore 'continue to be uncompensated').

²⁴⁹ See Commission, 'Communication on quantifying harm in actions for damages' (n 227), para 11.

²⁵⁰ J Almunia, 'Looking Back at Five Years of Competition Enforcement in the EU' (Global Antitrust Enforcement Symposium, Georgetown Law, Washington DC, 10 September 2014).

relied upon to establish the existence of a breach²⁵¹ and may provide evidence helpful in establishing causation and harm.²⁵² Private actions can reinforce public enforcement by increasing deterrence by increasing the resources available for the prosecution of competition law infringements²⁵³ and filling any ‘enforcement gap’, and by increasing the likelihood of detection and increasing the cost of non-compliance.

Difficult decisions may have to be taken, however, where the interaction between the two enforcement systems becomes strained or where a conflict arises. For example, in *Pfleiderer* a tension arose between the need to ensure, on the one hand, the effectiveness of the right to compensation available to victims of anti-competitive practices and, on the other, the effectiveness of the leniency programmes, which are a crucial aspect of the public enforcement of the Commission in its fight against cartels.²⁵⁴ The key question in that case was whether a victim of a cartel pursuing an action for damages before the national court should be provided access to the file of the German competition authority that included documents provided by applicants for leniency. The Advocate General neatly explained the dichotomy arising in the case. On the one hand, he pointed to the need to ensure the efficiency of the EU leniency programmes. This would be undermined if self-incriminating documents that participants in a cartel submitted in their application for leniency were then communicated to victims of the cartel which would use them as a basis of actions for damages at national level.²⁵⁵ On the other, he referred to the right to compensation for harm suffered as a result of anti-competitive behaviour.²⁵⁶ In the context of ensuring the effectiveness of this right, the information provided by a leniency applicant could evidently help a third party in preparing an action for damages under Article 101.²⁵⁷ The Advocate General then made a choice, according primacy to the EU interest in securing an effective public enforcement of competition policy and, indirectly, the common market objectives, over the interests of private claimants. Following this rationale, it would seem that the direct interests of specific consumers that are victims of anti-competitive practices could rank second to the effectiveness of the general system of public enforcement and the wider public interest. However, a more long-term view of this approach is that the system of public enforcement indirectly benefits consumer interests *as a whole* by promoting general deterrence. The Court was more cautious than the Advocate General and left the balancing exercise between those two objectives to be performed by national courts on a case-by-case basis. Although the Court has since held that a total ban on disclosure is contrary to the principle of effectiveness in EU law,²⁵⁸ it again confirmed that it is for the national court to decide whether access should be granted or refused and the conditions that apply. In other words, the Court has not made a clear choice between the objectives of the leniency

²⁵¹ The Directive provides that NCA infringement decisions are binding on national courts within that same member state, Final decisions of an NCA may, however, be presented before the national courts of another member state as at least *prima facie* evidence of a competition law infringement (Art 9 of the Directive).

²⁵² W Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32 *World Competition* 3, 15–16.

²⁵³ Nazzini and Nikpay (n 232) 111.

²⁵⁴ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

²⁵⁵ *ibid*, para 38 of the Opinion of the AG.

²⁵⁶ See *Courage* (n 235) and *Vincenzo Manfredi* (n 236).

²⁵⁷ *Pfleiderer* (n 254), paras 36–37 of the Opinion of the AG.

²⁵⁸ Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG*, judgment of 6 June 2013.

programmes and the direct interests of individual consumers seeking compensation for the harm that they have suffered as a result of anti-competitive practices and thus has sent the implicit message that these two objectives are, in principle, equally important. The Directive, however, overrides this solution, providing that national courts must not order disclosure of leniency and settlement documents in national proceedings.

Criticism may be levelled against some aspects of these recent reforms concerning private enforcement. For example, it could be argued that a bolder, more holistic approach should have been adopted in the Directive tackling a greater number of the areas of legal ambiguity that exist. Further, that because the Recommendation on collective redress takes the form of 'soft law' and recommends only systems based on the opt-in principle, the extent to which it will be able to bolster the position of the consumer is uncertain. However, overall, the consumer seems to have secured an increasingly prominent place in the context of the enforcement of the EU competition rules. Enforcement legislation and guidance documents refer more explicitly to the final consumer as an independent actor in EU competition law than in the context of the substantive law, and the initiatives briefly considered above suggest a strong trend towards the empowerment of the consumer in this field.

One final important point to note, however, is that the EU competition rules cannot reach all conduct or features of a market, which result in the process of competition working sub-optimally so that it does not deliver to consumers products or services which represent the best value for money. Articles 101 and 102 and the EUMR target certain types of conduct of undertakings which distort the process of competition:²⁵⁹ anti-competitive agreements, mergers and unilateral conduct of dominant firms. It has been seen, however, that Article 102 does not provide an ideal mechanism for dealing with exploitative conduct of an undertaking which holds a dominant position in the market. In addition, standard ex post competition law may not be able to reach 'tacit collusion'²⁶⁰ between undertakings operating on an oligopolistic market or easily deal with other structural problems that may arise on a market (for example, access to key infrastructure) or markets that fail because of blockages that occur on the demand side of the market. In such cases it may be features of the market other than the conduct targeted by these competition provisions which result in the market not operating efficiently.

In such situations consumer law and regulation may play a role in filling the gaps that competition law cannot reach. Consumer law, for example, seeks to deal with some obstructions to the demand side of the market by striving to ensure that consumers have access to accurate information which they can act on and by protecting them against unfairness, deception or undue pressure. Regulation may plug any holes still left by competition and consumer law. Thus in some sectors, such as energy and telecommunications, for example, sophisticated regulatory regimes may be required, in particular, to ensure access to essential infrastructure and facilities and

²⁵⁹ But see also the provisions that apply to the activities of the state, citations at n 27.

²⁶⁰ Broadly, tacit collusion occurs where undertakings operating on some oligopolistic markets, set their prices 'as if' there had been some explicit collusion between them. Oligopolists may recognise their interdependence and, without explicitly agreeing to do so, align their conduct and charge supra-competitive prices as a rational response to market circumstances. Market conditions may therefore dictate that, without any communication between the undertakings, they align their behaviour in a manner which maximises the profits of the players involved but reduces efficiency and the welfare of consumers.

to regulate the terms upon which access is given. Further, many jurisdictions confer broad powers upon competition agencies to conduct sector inquiries or market studies or investigations, in order to allow them to scrutinise closely markets that they believe may be malfunctioning and to discover the root cause.

V. CONCLUSIONS

The competitive process in a free market economy drives efficiency and delivers benefits to consumers by ensuring that the goods and services they receive represent the best value for money. One, if not the principal, goal of the competition rules is to ensure that markets operate efficiently so that the welfare of consumers is maximised. As a result, frequent references to ‘consumers’ and to ‘consumer welfare’ are found in the competition law context. Despite this, the exact meaning of these concepts has not been clearly elucidated in the legislation and the case law, suggesting that a more comprehensive attempt to clarify the position of the consumer in the framework of EU competition law is required. This article has, therefore, aimed to provide a taxonomy of those references and a more systematic analysis of the role of the ‘consumer’ and ‘consumer interests’ in EU competition law. In doing so, it has considered the position of the consumer in three main contexts: in defining the objectives of EU competition law; in the application of the substantive rules; and in the enforcement of these rules. This section summarises the main findings of this chapter.

There is, first of all, the primary question: *who* is the consumer referred to and protected by the competition rules? Unlike other areas of EU law, where the consumer is defined by the case law or legislation as a final user of goods and/or services (and different images of it are drawn such as the ‘average’ consumer or the ‘vulnerable’ consumer), the only comprehensive definition provided of the term ‘consumer’ in the competition law context, is that set out in the Commission Guidelines on the application of Article 101(3). There, the consumer is construed in very wide terms to encompass all direct and indirect users of a product, with the result that the interests of a broad contingent of economic actors (intermediate buyers, retailers, final consumers, etc) are included. This definition accords with the Commission’s view that the overarching objective of the rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. This understanding of the objectives of competition law has proved to be a key issue in ascertaining the role of the consumer in EU competition law. Although the Commission’s view that consumer welfare is the cornerstone of EU competition law has not been endorsed by the Court, it is generally accepted that ‘consumer welfare’ is at least one important objective of competition law. In addition, it seems clear that, although this term has been assigned a variety of meanings—ranging from narrow notions of consumer surplus, to broad ones equated with ‘total’ or ‘societal’ welfare—both the Commission and the wording of the TFEU seem to support the narrower definition of consumer welfare.

It has also been seen that pursuit of a consumer welfare objective may require trade-offs between different groups of consumers to be made as it concentrates on the maximisation of the welfare of consumers as a whole. Thus, despite Commission rhetoric which emphasises the position of the final consumer as the key beneficiary of the competition rules, the protection of the interests of *final* consumers, who are the essential consideration in other areas of EU law such as consumer law or internal market law (when consumer protection is invoked as a derogation to the provisions on

free movement), is just *one* element that is taken into account. Rather, competition law seeks to protect their interests by ensuring that competition is not distorted, in particular by cartels, anti-competitive mergers and the unlawful exclusionary conduct of dominant firms, and assumes that the benefits of competitive markets will cascade down to them.

This chapter has established that it is this broad perception of the ‘consumer’ that is used implicitly in many cases involving the application of the substantive competition rules and that this conclusion is not undermined by some examples of narrower images of the consumer being drawn. Rather, in most cases where a narrower definition of the consumer is adopted, the consumer identified is simply one playing a part in the more detailed analytical process of considering whether the competition laws apply or have been infringed: for instance, in the determination of the relevant product market or as a reference point in determining how particular groups of consumers have been or may be affected by particular conduct and consequently whether a restriction of competition or an abuse of dominant position has been committed. Thus, in spite of an apparent diversity of images of the consumer, it has been argued that the term ‘consumer’ is a chameleonic concept which simply adapts to the (competition law) context in which it is used.

To the inherently nebulous view of the objectives of competition law, more uncertainty is added by the use of assumptions, presumptions and indirect assessment to test the legality of market behaviour rather than an actual determination of harm. The focus of the analysis tends to be in the identification of behaviour that is detrimental to competition itself. Further, a competition law system may sometimes decline to condemn behaviour which harms consumers in the short term (for example, exploitative behaviour) in order to protect competition which, in turn, will deliver long-term benefits to consumers. Conversely, there may be behaviour (for example, predatory pricing) that may be prohibited even if it promotes consumer interests in the short term if it will damage the competitive process in the longer-run. The result is that the long-term and short-term interests of consumers must be weighed, and that the latter might be preferred where they coincide more easily with the benefits that the competitive process is supposed to deliver. It seems, therefore, that both in terms of the objectives and of the application of the Competition rules, these rules are applied not to protect directly or come to the aid of final consumers but on the premise that these consumers will draw indirect benefits from the protection of the process of competition. This analytical process, based upon legal presumptions and the assumption of long-term benefits, suggests a degree of remoteness from final consumer interests.

In contrast with the uncertainties that surround the application of the substantive rules, the consumer has seen a strengthening of its position in the context of the enforcement of the competition rules. The recent reforms, both in the field of the public and private enforcement of Articles 101 and 102, have developed and fortified avenues and mechanisms for the consumer to be able to defend their interests in the face of anti-competitive behaviour. Here, the final consumer has begun to emerge as an actor in its own right and as part of the drive to ensure the effectiveness of the substantive rules.

Ultimately, competition law is enforced to promote the process of competition, with the understanding that this will, in turn, deliver benefits to consumers. Consumers are therefore shown a ‘promised land’ that will take some time to be reached. As far as final consumers—and what they can expect from competition

law—are concerned, the way in which the competition rules are applied conjures up the image of a house of cards, intricately built but without a thoroughly solid foundation. The fact that strong mechanisms of enforcement have been developed to ensure that consumers can take action in cases where there has been a breach of the competition rules is a welcome move, but it does not make up for the fact that the actual role of consumer interests in substantive assessments is far from clear. Whether this lack of clarity can be sustained today is questionable, particularly given the obligations imposed by Article 12 TFEU and Article 38 of the EU Charter on Fundamental Human Rights. However, the full implications of these provisions for EU competition law remain to be seen.